Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

ESTATE OF ELEANOR R. GERSON, Deceased,
ALLAN D. KLEINMAN, Executor,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK D. TUCKER
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
41 South High Street
26th Floor
Columbus, OH 43215
(614) 223-9300
Counsel for Petitioner

JEFFRY L. WEILER
Counsel of Record
MARK A. PHILLIPS
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
200 Public Square
Suite 2300
Cleveland, Ohio 44114
(216) 363-4500

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Is Section 1433(b)(2)(A) of the Tax Reform Act of 1986, Pub.L. 99-514, ambiguous, allowing the Secretary of the Treasury to promulgate and enforce a regulation construing that section in a manner that is at odds with the determinations of two United States Courts of Appeals that the section is plain and unambiguous?

2. May the Secretary of the Treasury ignore the determination of a United States Court of Appeals that the language of Section 1433(b)(2)(A) of the Tax Reform Act of 1986, Pub.L. 99-514, is plain and unambiguous, and promulgate an interpretive regulation—Treas. Reg. § 26.2601-1(b)(1)(i)—that is contrary to the court's interpretation?

3. Is Petitioner liable for a deficiency in federal generation-skipping transfer tax in the amount of $1,144,465.00 based upon a holding that Treas. Reg. § 26.2601-1(b)(1)(i) is a reasonable and valid interpretation of Section 1433(b)(2)(A) of the Tax Reform Act of 1986, Pub.L. 99-514, when that regulatory provision is contrary to the plain language of the statute?

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OPINIONS BELOW

The October 24, 2006 decision of the United States Tax Court is reported at 127 T.C. 139, and is set out in the appendix at App. 13a.

The November 9, 2007 decision of the United States Court of Appeals for the Sixth Circuit is reported at 507 F.3d 435, and is set out in the appendix at App. 1a.

JURISDICTION

The decision of the Sixth Circuit from which petitioner seeks a writ of certiorari was filed on November 9, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The court of appeals was vested with jurisdiction over the appeal from the United States Tax Court pursuant to 26 U.S.C. § 7482(a). The United States Tax Court was vested with jurisdiction in this case pursuant to 26 U.S.C. §§ 6213(a), 6214(a) and 7442.

STATUTORY AND OTHER PROVISIONS INVOLVED

Pursuant to Supreme Court Rule 14.1(f), the text of the statutory and other provisions involved in this case is set out in the appendix beginning at App. 73a.

STATEMENT OF THE CASE

On May 10, 2004, Respondent Commissioner of Internal Revenue issued a notice of deficiency against Petitioner Estate of Eleanor R. Gerson ("Gerson Estate") under 26 U.S.C. § 6212 for a claimed deficiency in payment of the federal "generation-skipping transfer tax" ("GST tax").

1. The Generation-Skipping Transfer Tax and the Administrative Regulations. The GST tax was imposed by Congress as part of the enactment of the Tax Reform Act of 1986 (the "1986 TRA"). See P.L. 99-514, § 1431, 100 Stat. 2717 (codified at 26 U.S.C. § 2601, *et seq.*).[1] The purpose of the GST tax "is to ensure that generation skipping transfers do not escape the estate tax, that is, that such transfers are taxed as if they were made from one generation to the next, and then to the next after that, instead of skipping a generation." *Simpson v. United States*, 183 F.3d 812, 813 (8th Cir. 1999).

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[1]A form of GST tax had been enacted a decade earlier as part of the Tax Reform Act of 1976, Pub.L. 94-455, § 2006, but was retroactively repealed by the 1986 TRA. See P.L. 99-514, § 1433(c)(1).

A GST tax is imposed on "every generation-skipping transfer" pursuant to 26 U.S.C. § 2601.[2] Such transfers, categorized as "taxable terminations," "taxable distributions," and "direct skips," 26 U.S.C. § 2612, occur when an interest in property passes to a "skip person," defined as "a natural person assigned to a generation which is 2 or more generations below the generation assignment of the transferor" or a trust "if all interests in such trusts are held by skip persons . . . ." 26 U.S.C. § 2613.

Generally, the GST tax applies to any transfer made to a skip person after October 22, 1986, the date of the enactment of the 1986 TRA. Pub.L. 99-514, § 1433(a), 100 Stat. 2731. However, several exceptions were adopted by Congress that exempt GST taxes under certain trusts and wills, including the following:

> (2) EXCEPTIONS.—The amendments made by this part shall not apply to—
>
> (A) any generation-skipping transfer under a trust which was irrevocable on September 25, 1985, but only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985. * * *

Pub.L. 99-514, § 1433(b)(2)(A), 100 Stat. 2731 (the "Effective Date Exception").[3]

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[2] The tax imposed is a flat rate tax equal to the maximum estate tax rate in effect at the time of the transfer, which rate is multiplied by a statutorily-defined "inclusion ratio." 26 U.S.C. §§ 2641 & 2642. The person liable for the tax is determined by whether the transfer is a "taxable distribution," a "taxable termination," or a "direct skip." 26 U.S.C. § 2603.

[3] The Effective Date Exception was amended in 1988 to add the parenthetical phrase "(or out of income attributable to

In March 1988, the Secretary of the Department of the Treasury (the "Secretary") began issuing temporary and proposed regulations governing the implementation of the new GST tax provisions, including the effective date rules contained in the 1986 TRA. See Temp. Treas. Reg. 26.2601-1T, 53 Fed. Reg. 8441 (March 15, 1988). Final regulations were published on December 27, 1995. T.D. 8644, 60 Fed. Reg. 66,903 (Dec. 27, 1995). These regulations included the following provision with respect to the Effective Date Exception:

> (b) Exceptions—(1) Irrevocable trusts—(i) In general. The provisions of chapter 13 do not apply to any generation-skipping transfer under a trust (as defined in section 2652(b)) that was irrevocable on September 25, 1985. The rule of the preceding sentence does not apply to a pro rata portion of any generation-skipping transfer under an irrevocable trust if additions are made to the trust after September 25, 1985. See paragraph (b)(1)(iv) of this section for rules for determining the portion of the trust that is subject to the provisions of chapter 13.

Treas. Reg. § 26.2601-1(b)(1)(i) (as finalized by T.D. 8644, 60 Fed. Reg. 66,903 (Dec. 27, 1995)).

In July 1999, the United States Court of Appeals for the Eighth Circuit issued its opinion in *Simpson v. United States*, 183 F.3d 812 (8th Cir. 1999). At issue in that case was whether a GST resulting from the exercise of a general power of appointment granted to a woman under her deceased spouse's testamentary trust, fell within the terms of the Effective

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corpus so added)" at the end of the provision. Pub.L. 100-647, § 1014(h), 102 Stat. 3567.

Date Exception. The testamentary trust had become irrevocable in 1966 upon the death of her husband. The woman exercised the general power of appointment granted her under the trust in her will, which became effective upon her death in 1993. The government asserted that the woman's exercise of the general power of appointment under the irrevocable trust did not fall within the Effective Date Exception.

The Eighth Circuit, however, rejected the Commissioner's interpretation of the Effective Date Exception as contrary to the statute. The court held that "the plain language of the [Effective Date Exception] . . . covers the transfer made by the exercise of her power of appointment, and there is no sufficient reason not to apply the plain language of the statute." *Simpson*, 183 F.3d at 813. The court found the government's contrary interpretation "untenable," *Simpson*, 183 F.3d at 814, and further explained:

> Which side is right about the purpose of the statute? The issue is easily resolved, we think, by consulting the most important evidence of a statute's purpose that is, its words. Recall the relevant clause: "any generation-skipping transfer under a trust which was irrevocable on September 25, 1985." The government wants us to read the words, in effect, as though "which" modified "transfer." This is not a meaning that the words will bear. The antecedent of "which" is "trust," not "transfer." The relevant action which has to take place before September 25, 1985, is the creation of the trust, or rather its becoming irrevocable, not the occurrence of the generation-skipping transfer. We see no escape from the logic of this reasoning. In the present case, the

> trust became irrevocable before September 25, 1985. The transfer was made possible by the trust. The transfer was "under" the trust. The fact that the transfer occurred after September 25, 1985, and, indeed, that Mrs. Bryan, the transferor, could have avoided the GST tax by giving the property to someone other than her grandchildren, is not relevant. The point is that when the trust was created and became irrevocable Mrs. Bryan was given the authority, under the law as it then existed, to exercise her general power of appointment in favor of anyone at all, and to do so without subjecting the transfer to a GST tax, such a tax then being far in the future. This is the sort of reliance that the effective-date provision protects.

Simpson, 183 F.3d at 814-15.

On November 18, 1999, in direct reaction to this ruling, the Secretary proposed to amend Treas. Reg. § 26.2601-1(b)(1)(i) by adding the following language at the end of that regulation:

> Further, the rule in the first sentence of this paragraph (b)(1)(i) does not apply to a transfer of property pursuant to the exercise of a general power of appointment that is treated as a taxable transfer under chapter 11 or chapter 12. The transfer is made by the person holding the power at the time the exercise, release, or lapse of the power becomes effective and is not considered a transfer under a trust that was irrevocable on September 25, 1985. See paragraph (b)(1)(v)(B) of this section regarding the treatment of the release, exercise, or lapse of a power of appointment that will result in a constructive

addition to a trust. See §26.2652-1(a) for the definition of a transferor.

Notice of Proposed Rulemaking, REG-103841-99, 1999-2 C.B. 639, 64 Fed. Reg. 62,997 (Nov. 18, 1999). The amendment was published as part of the final regulations on December 20, 2000, retroactively effective to November 18, 1999, T.D. 8912, 65 Fed. Reg. 79,738 (Dec. 20, 2000), and is now found at 26 C.F.R. § 26.2601-1(b)(1)(i).[4] On February 28, 2000, the Internal Revenue Service issued 2000-9 I.R.B. 711, 2000 WL 33910971, advising taxpayers that "[t]he Commissioner NONACQUIESCES in the" *Simpson* decision.

2. The Commissioner's determination that the Gerson Estate was liable for the GST tax. Notwithstanding the Effective Date Exception, and the *Simpson* and *Bachler* decisions, the Commissioner determined that the Gerson Estate was liable for the payment of the GST tax. The Commissioner made that determination under the following factual circumstances. Eleanor R. Gerson ("Eleanor") was married to Benjamin S. Gerson ("Benjamin") from 1938 until his death in 1973. They had four children and five grandchildren. More than four years before his death, Benjamin, as grantor, executed a revocable trust agreement (the "Benjamin Gerson Trust"). Upon Benjamin's death, the trust, as amended, became irrevocable.

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[4] Following the adoption of the regulation, the United States Court of Appeals for the Ninth Circuit issued its decision in *Bachler v. United States*, 281 F.3d 1078 (9th Cir. 2002), in which it held, like the Eighth Circuit in *Simpson*, *supra*, that the statutory Effective Date Exception was plain and unambiguous and that it applied in a factual situation virtually identical to the ones in *Simpson* and the present case.

Article III, Paragraph A of the Benjamin Gerson Trust, as amended, provided that, if Eleanor survived Benjamin, the trust corpus was to be divided into three trusts, designated Trusts A, B and C. The property to be allocated to Trust A was defined as:

> [A]n amount which when added to the value for federal estate tax purposes of all items in my gross estate which qualify for the estate tax marital deduction and which pass or have passed to my said wife under other provisions hereof . . . or otherwise than under this Trust Agreement, will equal twenty percent (20%) of my gross estate.

Article III, Paragraph B, of the Benjamin Gerson Trust provided for the distribution of income and principal of Trust A for the "sole benefit" of Eleanor. It further provided that, upon her death, Eleanor had "an unlimited testamentary power of appointment" with regard to the balance remaining in Trust A. If Eleanor died "without having fully and effectively exercised" this general power of appointment, then the remaining corpus of Trust A was to be transferred to and disposed of as part of Trust C.

Eleanor lived for more than 27 years after Benjamin's death, dying on October 20, 2000. She was survived by her four children and five grandchildren. At the time of her death, the corpus of Trust A of the Benjamin Gerson Trust had a value of $6,244,627.16, and no additions had been made to the corpus of Trust A after September 25, 1985. Eleanor exercised her general power of appointment under the Benjamin Gerson Trust in her will, allocating the balance of Trust A to National City Bank as Trustee of a trust "for the benefit of [her] grandchildren and more remote descendants" ("the Eleanor Gerson Trust").

Allan D. Kleinman ("Kleinman") was appointed the executor of Eleanor's estate on November 13, 2000. On July 21, 2001, Kleinman timely filed a Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return (the "Estate's Return"), reporting a gross estate in the amount of $22,054,002.79, and federal estate taxes due in the amount of $7,168,531.02. The latter amount was remitted with the Gerson Estate's Return. Kleinman also filed a Form 8275-R, Regulation Disclosure Statement, serving notice that the Gerson Estate was taking a position that was contrary to Treas. Reg. § 26.2601-1(b)(1)(i) in connection with the assets transferred from Trust A of the Benjamin Gerson Trust to the Eleanor Gerson Trust pursuant to Eleanor's exercise of the general power of appointment granted under Trust A. Nearly three years later, the Commissioner issued a notice of deficiency claiming that the Gerson Estate was responsible for the payment of $1,144,465 for the GST tax.

On July 29, 2004, Petitioner timely petitioned the United States Tax Court for redetermination of the alleged deficiency pursuant to 26 U.S.C. § 6213(a). The Commissioner answered, and the case was submitted to the court for decision on stipulated facts.

3. The decisions below. On October 31, 2006, the Tax Court, by a ten-to-five vote, entered its decision in favor of Respondent finding Petitioner liable for a deficiency in federal generation-skipping transfer tax in the amount of $1,144,465. The decision resulted in six different opinions: the majority opinion, three concurring opinions, and two dissenting opinions, with one judge concurring in the result only. Only seven of the fifteen judges participating in the case joined

in the court's Opinion, holding that Treas. Reg. § 26.2601-1(b)(1)(i) is a "reasonable and valid interpretation" of Section 1433(b)(2)(A) of the Tax Reform Act of 1986, Pub.L. 99-514. The five dissenting judges concluded that the regulation was contrary to the "plain and unambiguous" language of the statute. *Estate of Gerson v. Commissioner of Internal Revenue*, 127 T.C. 139 (2006), App. at 13a.

Petitioner thereafter timely appealed the Tax Court's decision to the United States Court of Appeals for the Sixth Circuit. On November 9, 2007, that court unanimously affirmed the decision of the Tax Court. *Estate of Gerson v. Commissioner of Internal Revenue*, 507 F.3d 435 (2007). In its decision, the court determined that § 1433(b) was ambiguous, and that the Commissioner had "reasonably construed the statute," *Estate of Gerson*, 507 F.3d at 441, App. at 11a, through the promulgation of Treas. Reg. § 26.2601-1(b)(1)(i).

THE REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

The Sixth Circuit's decision in this case is at odds with the decisions of the United States Courts of Appeals for the Eighth and Ninth Circuits in *Simpson* and *Bachler*, respectively. In those cases, the courts concluded that the Effective Date Exception was clear and unambiguous and excepted the taxes imposed upon the Gerson Estate herein. As observed by the court in *Bachler*, "[t]he statute creating the exception, carefully drafted to exclude additions to the trust corpus, makes no exclusion for the exercise of a general power of appointment." *Bachler*, 281 F.3d at 1080. The Sixth Circuit's decision has the effect of rendering the Gerson Estate liable for pay-

ment of the GST tax based solely upon the residence of Eleanor or the administrator of her estate, while transfers made by other taxpayers—particularly those domiciled in territory encompassing the Eighth and Ninth Circuits—are properly excepted.

Petitioner maintains that, contrary to the Sixth Circuit's decision herein, the imposition of GST tax liability is directly contrary to the plain and straightforward language of the Effective Date Exception, and that the Secretary's regulatory interpretation of that exception, therefore, reflects an impermissible construction of the statute. Accordingly, the regulation is invalid, and the Commissioner cannot premise the notice of deficiency on that regulation.

Moreover, this case raises important issues under this Court's ruling in *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), wherein the Court held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." 545 U.S. at 982 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 842 (1984)). As noted above and as discussed in greater detail below, both the Eighth and Ninth Circuits have concluded that the Effective Date Exception is clear and unambiguous. The Eighth Circuit's decision preceded the promulgation of the regulation at issue herein, and it—like the Ninth Circuit would later do—construed the words of the statute as applying to transfers resulting from the exercise of a general power of appointment granted under a trust that was irrevocable prior to September 25, 1985. It was only

after the Eighth Circuit's decision was issued—indeed, in direct reaction to it—that the Secretary promulgated the regulation at issue in an attempt to negate the court's holding. Thus, under this Court's decision in *Brand X Internet Servs.*, the Commissioner's interpretation of the statutory Effective Date Exception, as reflected in Treas. Reg. § 26.2601-1(b)(1)(i), is not entitled to deferential review.

The Sixth Circuit herein evaded the application of the *Brand X Internet Servs.* rule by simply concluding that it was not bound by its sister circuits' holding that the statute was unambiguous. Finding an ambiguity where none otherwise existed, the court deferred to the regulation as a reasonable administrative interpretation entitled to the full level of *Chevron* deference. Petitioner maintains that no ambiguity in the Effective Date Exception exists, and that *the Commissioner* was, therefore, bound by the prior judicial construction of the statute. The Treasury regulation must, therefore, fall.

Treas. Reg. § 26.2601-1(b)(1)(i) impermissibly purports to re-write the statute and to override the judicial construction of the statute's plain language to the extent it excludes transfers such as the one herein from the Effective Date Exception. Contrary to the decisions below, the regulation cannot be harmonized with the statute's plain language, origin and purpose and does not reflect a reasonable exercise of regulatory authority. The Court should therefore grant a writ of certiorari and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

II. THE EFFECTIVE DATE EXCEPTION TO THE GENERATION-SKIPPING TRANSFER TAX CONTAINED IN SECTION 1433(b) IS UNAMBIGUOUS, AND ANY ADMINISTRATIVE REGULATION CONTRARY TO THAT PLAIN AND UNAMBIGUOUS STATUTE MUST FALL.

With its decision, the Sixth Circuit created a conflict with decisions of the United States Courts of Appeals for the Eighth and Ninth Circuits. In doing so, the court below has elevated a simple case involving a plainly and unambiguously worded statute into one that demands this Court's review. Allowing the Sixth Circuit's decision to stand will subject taxpayers throughout the country to differing rules and levels of taxation based solely upon their geographic location. Accordingly, the Court should grant the requested writ of certiorari and reverse the decision of the court of appeals herein.

Both the Tax Court and the Sixth Circuit below devoted a great deal of their decisions in this case to discussing the appropriate level of deference to be accorded Treasury Regulations issued pursuant to 26 U.S.C. § 7805(a) (giving the Secretary the general authority to issue interpretive regulations). See *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982) (Treasury Regulations adopted pursuant to 26 U.S.C. § 7805(a) are "interpretive" and owed less deference than regulations issued under a specific Congressional grant of authority). Ultimately, the Sixth Circuit ruled that interpretive Treasury Regulations are entitled to full "*Chevron* deference," see *Estate of Gerson*, 507 F.3d at 438 (citing *Chevron U.S.A., Inc.*, 467 U.S. at 842). Petitioner maintains however, that Treas. Reg. § 26.2601-1(b)(1)(i), 26

C.F.R. § 26.2601-1(b)(1)(i), is entitled to no deference as it is contrary to the plain and unambiguous meaning of the statutory Effective Date Exception.

The Court has long held that:

> in interpreting a statute a court should always turn first to one cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then this first canon is also the last: "judicial inquiry is complete."

Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted). Accordingly, the first step in all statutory construction cases "'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)).

The language used by Congress establishing the statutory Effective Date Exception is clear and unambiguous. It provides, in relevant part, that the GST tax will not apply to "any generation-skipping transfer under a trust which was irrevocable on September 25, 1985, but only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985. . . ." Pub.L. 99-514, § 1433(b)(2)(A), 100 Stat. 2731. As the Eighth Circuit stated, "[t]he words of Section 1433(b)(2)(A) are clear, at least to us, and we see no reason not to apply them. The words make it clear that Congress intended to protect the reliance of creators of trusts on the law as it existed at the time the trusts became irrevocable." *Simpson*, 183 F.3d at 816.

Absent ambiguity in the statutory language, no regulatory interpretation is either required or permitted. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc.*, 467 U.S. at 842-43.

The Sixth Circuit herein avoided the application of this rule by simply finding that the preposition "under," as used in the phrase "under a trust" within the Effective Date Exception, was ambiguous. *Estate of Gerson*, 507 F.3d at 441; App. at 10a. The court based this holding primarily upon the fact the word "under" was not defined in the statute. *Id.*[5] This conclusion cannot withstand scrutiny. See *Simpson*, 183 F.3d at 816 ("It is true that the ingenuity of lawyers can usually scrape up some tag end of ambiguity on which to hang a policy hat. But Judges are obliged, unless there is a substantial uncertainty as to the meaning of the words of a statute, to apply the statute as written, unless the words are simply nonsense, or self-contradictory, or something of that kind. This is not such a case.").

Petitioner is unaware of any precedent holding that a word or phrase used in a statute is ambiguous merely because Congress chose not to define that term. See *Estate of Gerson*, 127 T.C. at 169 n.2, App. at 60a (Laro, J., dissenting). In the absence of a statutory definition, courts must "construe a statutory term in accordance with its ordinary and natural

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[5] The Tax Court similarly premised its finding of ambiguity upon the fact the term "transfer under a trust" was not defined in the statute. See *Estate of Gerson*, 127 T.C. at 154, App. at 35a-36a.

meaning." *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 476 (1994). This is particularly true in the case of "nontechnical words and phrases." *Smith v. United States*, 508 U.S. 223, 228 (1993) (citation omitted).

Both the *Simpson* and *Bachler* courts found that the application of the "ordinary and natural meaning" of the phrase "under a trust" requires the conclusion that a GST resulting from the exercise of a general power of appointment granted under a trust that was irrevocable on September 25, 1985, falls within the plain wording of the Effective Date Exception. *Simpson*, 183 F.3d at 816 ("[T]he transfer at issue in this case took place under a trust which was irrevocable on September 25, 1985. The GST tax therefore does not apply."); *Bachler*, 281 F.3d at 1080 ("Acting under the trust created by her husband, [the decedent] fitted her gifts to her grandchildren so that they fell within the exact wording of § 1433(b)(2)(A)."). The Sixth Circuit's finding of ambiguity in a word that must be given its plain and ordinary meaning cannot, therefore, stand.

Application of these principles leads to the inescapable conclusion that Treasury Regulation § 26.2601-1(b)(1)(i)—to the extent it purports to exclude from the statutory Effective Date Exception transfers accomplished by the exercise of a general power of appointment granted under a trust that was irrevocable on September 25, 1985—is invalid. See *Koshland v. Helvering*, 298 U.S. 441, 447 (1936) (Where a statute is "unambiguous, and its directions specific, there is no power to amend it by regulation."). No such exclusion from the exception is stated or even hinted at in the plain language used by Congress. The statute was "carefully drafted" to provide for only one exclu-

sion, applicable solely in those instances where a GST was "made out of corpus added to the trust after" the specified date. *Bachler*, 281 F.3d at 1080. No other exclusion can or should be inferred or implied. The Sixth Circuit, therefore, erred by concluding that the Effective Date Exception was ambiguous and according the interpretive regulation the utmost deference.

In upholding the regulation despite the statute's otherwise plain meaning, the Tax Court resorted to the history of the GST tax in general to support its conclusion that the regulatory interpretation "harmonizes with the origin and purpose of" the statute. *Estate of Gerson*, 127 T.C. at 156, App. at 38a. Indeed, the Tax Court expressly rejected the notion that it was bound by the plain meaning of the statute. See *Estate of Gerson*, 127 T.C. at 155, App. at 36a ("[W]e do not evaluate the validity of section 26.2601-1(b)(1)(i), GST Tax Regs., by examining the plain language of TRA 1986 section 1433(b)(2)(A) in a vacuum—we also are obliged to consider the origin and purpose of the statute."). The Sixth Circuit reached a similar conclusion. *Estate of Gerson*, 507 F.3d at 441, App. at 11a ("[T]he regulation conforms the grandfather clause to other elements of the tax scheme.").

In essence, both courts below resorted to what they believed was established by legislative history in order "to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 148 (1994). It is only, however, "the most extraordinary showing of contrary intentions from" legislative history that would warrant or justify a departure from the plain meaning of statutory language. *Garcia v. United States*,

469 U.S. 70, 75 (1984). Indeed, the Court has stated that:

> [t]he "plain purpose" of legislation . . . is determined in the first instance with reference to the plain language of the statute itself. Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of problems Congress is called upon to address and the dynamics of legislative action . . . . Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Board of Governors of Fed. Reserve Sys. v. Dimension Financial Corp., 474 U.S. 361, 373-74 (1986) (rejecting Federal Reserve Board's attempt to expand definition of regulated institutions beyond statutory scope based on the "policy of the legislation as a whole"). It may well be, as the Tax Court notes, that in enacting the GST tax Congress had the broad purpose of imposing a uniform tax in a manner that minimized the exceptions thereto. *Estate of Gerson*, 127 T.C. at 155-56, App. at 38a. But the legislative history, even if it supported the Commissioner's interpretation, simply cannot override the plain language of the statutory Effective Date Exception itself.[6]

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[6] Contrary to the Tax Court's view, the legislative history of the Effective Date Exception does not serve to justify the interpretation embodied in Treas. Reg. § 26.2601-1(b)(1)(i). A Congressional staff report discussing the proposed exception supports the plain meaning attributed to the exception by the Eighth and Ninth Circuits: "The amended GST tax would apply to transfers after the date of enactment, subject to the following exceptions: * * * (2) *Transfers from trusts that were irrevocable*

In the final analysis, Treas. Reg. § 26.2601-1(b)(1)(i) is not capable of being "harmonized" with the plain language of the Effective Date Exception. The regulation, as amended in 1999, provides that the Effective Date Exception "does not apply to a transfer of property pursuant to the exercise, release, or lapse of a general power of appointment that is treated as a taxable transfer under chapter 11 or chapter 12" because "the transfer is made by the person holding the power at the time the exercise, release or lapse of the power becomes effective," and, therefore, "is not considered a transfer under a trust that was irrevocable on September 25, 1985." The statutory Effective Date Exception, however, explicitly applies to *any* GST under a trust, without restriction or reference to how the transfer may be treated under other provisions of chapter 13 or the Internal Revenue Code generally. Treas. Reg. § 26.2601-1(b)(1)(i) effectively but impermissibly re-writes the plain language of the Effective Date Exception, adding an exclusion that is not expressed in and cannot be implied from that language. The regulation simply cannot withstand judicial scrutiny. The Court should, therefore, grant the requested writ

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before September 26, 1985, would be exempt to the extent that the transfers are not attributable to additions to the trust corpus after that date. Staff of the Joint Comm. on Taxation, 99th Cong., Tax Reform Proposals in Connection with Committee on Ways and Means Markup, at 136 (Sept. 26, 1985) (emphasis added). See also H.R. Rep. No. 99-426, at 828 (1985); H.R. Conf. Rep. No. 99-841, at II-775 (1986); Staff of the Joint Comm. on Taxation, 100th Cong., General Explanation of the Tax Reform Act of 1986, at 1267 (1987). These reports show no intent on the part of Congress to limit the scope of the Effective Date Exception in a manner at odds with the plain meaning of the exception itself.

and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

III. TREAS. REG. § 26.2601-1(b)(1)(i) REPRESENTS AN IMPERMISSIBLE ATTEMPT TO OVERRIDE A PRIOR JUDICIAL CONSTRUCTION OF THE STATUTORY EFFECTIVE DATE EXCEPTION BASED UPON THE UNAMBIGUOUS WORDS OF THE STATUTE ITSELF.

As noted above, deference is ordinarily accorded to the Secretary's regulations adopted pursuant to 26 U.S.C. § 7805(a), so long as such regulations "'implement[ ] the congressional mandate in some reasonable manner.'" *Vogel Fertilizer Co.*, 455 U.S. at 24 (citation omitted). However, no deference can be afforded a regulatory interpretation of a statute when it directly contradicts a prior judicial construction and thereby seeks to usurp and override the authority of the federal courts.

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Chevron U.S.A., Inc., 467 U.S. at 843 n.9. See also *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004) (Deference to an agency's "statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.").

Consistent with these principles, a court's prior construction of a statute trumps an agency construction which may otherwise be entitled to *Chevron* deference "if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X Internet Servs.*, 545 U.S. at 982. See also *Koshland*, 298 U.S. at 447; *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) ("Once the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now *says* what the court has prescribed.") (emphasis in original).

Following the decision in *Simpson*, *supra*, the Secretary was foreclosed from issuing an interpretive regulation that directly contradicted the Eighth Circuit's "plain language" analysis and holding. Through the amendment of Treas. Reg. § 26.2601-1(b)(1)(i) less than four months after Simpson was decided,[7] the Secretary sought to reverse a prior judicial construction of the Effective Date Exception that was undeniably based upon the plain wording of the statute itself. See *Simpson*, 183 F.3d at 816 ("The words of Section 1433(b)(2)(A) are clear . . . and

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[7] The Commissioner does not dispute that the amendment, promulgated thirteen years after the 1986 version of the GST Tax was enacted, was adopted in direct response to *Simpson*. See Notice of Proposed Rulemaking, REG-103841-99, 1999-2 C.B. 639, 64 Fed. Reg. 62,997 (Nov. 18, 1999). The Tax Court acknowledged as much: "We note at the outset that the Secretary promulgated section 26.2601-1(b)(1)(i), GST Tax Regs., after the Commissioner received an adverse decision from the Eighth Circuit in *Simpson*." *Estate of Gerson*, 127 T.C. at 152, App. at 33a.

we see no reason not to apply them.").[8] Accordingly, the Commissioner's interpretation of the statutory Effective Date Exception as reflected in the challenged regulation is not entitled to deferential review—the regulation is, in fact, trumped by a prior judicial construction holding that the agency's interpretation was "unambiguously foreclose[d]" by the statute's plain language. *Brand X Internet Servs.*, 545 U.S. at 982-83.

Nevertheless, the Sixth Circuit herein deferred to the Commissioner's regulatory interpretation of the Effective Date Exception, finding it to be "reasonable" under the second step of the *Chevron* test. *Estate of Gerson*, 507 F.3d at 441, App. at 11a. It dismissed the application of the rule articulated in *Brand X Internet Servs.* by simply concluding that it was not bound by its sister circuits' holding that the statute was unambiguous and precluded the interpretation urged by the Commissioner and subsequently adopted in regulation by the Secretary. *Id.* at 440 n.2, App. at 9a.[9] Thus, the Sixth Circuit's ruling presents squarely for decision by this Court whether a regulation

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[8] As noted above, in February, 2000, the Internal Revenue Service issued 2000-9 I.R.B. 711, 2000 WL 33910971, advising taxpayers that "[t]he Commissioner NONACQUIESCES in the" *Simpson* decision, in effect announcing that he would not consider himself bound by the judicial determination that the statute was plain and unambiguous.

[9] The Sixth Circuit characterized Petitioner's argument as being that *Brand X Internet Servs.* "requires us to follow the Eighth Circuit's 'plain language' determination." *Id.* This is incorrect. Rather, Petitioner contended below and asserts here that the rule announced in *Brand X Internet Servs.* precluded the application of *Chevron* deference and that the promulgation of the regulation by the Secretary was therefore invalid in light of the holding in *Simpson*.

promulgated in contradiction to a prior judicial decision predicated on the plain language of a statute is entitled to *Chevron* deference upon subsequent judicial review.

The need for the Court to take up this question is demonstrated by the decisions below. Having been told by a federal court of appeals exactly what the statute unambiguously means—and having not sought this Court's review of that decision—the Secretary had no authority to promulgate a regulation adopting a contrary interpretation. Yet, both the Tax Court and the Sixth Circuit concluded that the regulation issued by the Secretary in derogation of *Simpson* was entitled to deferential review and constituted a "reasonable" interpretation of the statute. In essence, they found that, because they themselves were not bound by the Eighth Circuit's holding, neither was the Secretary nor the Commissioner.

Such reasoning clearly negates and renders meaningless the rule articulated by the Court in *Brand X Internet Servs.* It permits the Secretary to promulgate and the Commissioner to enforce a regulation directly contrary to a judicial determination that explicitly held that the words of the statute "unambiguously require[d] the court's construction." *Brand X Internet Servs.*, 545 U.S. at 985. This goes well beyond the administrative "gap-filling" authority recognized in *Chevron* and reaffirmed in *Brand X Internet Servs.* It effectively removes from the judicial branch its constitutionally-charged power "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and transfers it to the executive branch.

This result is evident in the Sixth Circuit's reasoning. The court found an ambiguity in the mean-

ing of the preposition "under" as used in the Effective Date Exception—not through the use of any textual analysis or by employing any canon of statutory construction—but because "both parties [the Estate and the Commissioner] offer plausible, contrary interpretations." *Estate of Gerson*, 507 F.3d at 441, App. at 11a. In effect, the court found that the Secretary created an "ambiguity" simply by offering an alternative interpretation in regulation, even where a sister appellate court, which examined the actual words contained in the Effective Date Exception, previously concluded that the plain and unambiguous language of the statute foreclosed that construction.[10] Such

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[10]The Sixth Circuit also premised its finding of ambiguity, in part, upon the decision of the United States Court of Appeals for the Second Circuit in *E. Norman Peterson Marital Trust v. Commissioner of Internal Revenue*, 78 F.3d 795 (2d Cir. 1996). The Second Circuit's decision in *Peterson* does not, however, support a finding of ambiguity. Indeed, the *Peterson* court did not even address the same issue that was before the Eighth Circuit in *Simpson*, the Ninth Circuit in *Bachler*, or the Sixth Circuit herein. As the Court in *Bachler* noted:

> In this case Peterson died in 1974, leaving his wife the life beneficiary of a trust with a general testamentary power of appointment and a provision that, if she did not exercise the power, the remainder was to go to the grandchildren. She died in 1987, not having exercised the power. Seeking to sustain the GST on the transfer to the grandchildren, the government relied on Temp. Treas. Reg. § § 26.2601-1(b)(1)(v)(A), which defined the lapse of a general power of appointment as an addition of corpus to the trust. Judge Calabresi in a thoughtful opinion sustained the regulation as a reasonable interpretation of the statute so that, by the statute's own terms, the transfer did not qualify as an exception. *But that case is not ours. Here nothing was added to the corpus.*

Bachler, 281 F.3d at 1079 (emphasis added). See also *Simpson*, 183 F.3d at 815 ("The question in the *Peterson* case was not whether the transfer effected by Mrs. Peterson's

reasoning turns *Chevron* analysis on its head: because the challenged regulation offers a plausible alternative interpretation of the statute, the statute must be ambiguous and, therefore, the regulation *creating* the "ambiguity" is subject to deferential review. The task of statutory construction is fully ceded to the administrative agency.

In truth, there is nothing "plausible" or "reasonable" about the interpretation of the Effective Date Exception reflected in Treas. Reg. § 26.2601-1(b)(1)(i). The regulation purports to insert into the statute an "identity of transferor" limitation on the Exception's application that is not found anywhere in the statute's text or referred to in its legislative history. Nothing in the language of the statute indicates that Congress intended to limit its applicability based on who the "transferor" of property is deemed to be for estate or gift tax purposes under chapters 11 and 12 of the Code. Rather, the Effective Date Exception expressly states that it applies to *any* transfer under a trust which was irrevocable as of September 25, 1985, without reference to how the transfer may

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choosing not to exercise her power was 'under' the trust, but rather whether the transfer had been made 'out of corpus added to the trust after September 25, 1985.'"). *Bachler, Simpson,* and this case do not involve constructive additions to trusts under any Treasury Regulation. Indeed, the Commissioner stipulated herein that no additions were made to the corpus of the Benjamin Gerson Trust after September 25, 1985. Consequently, the *Peterson* decision is completely devoid of any analysis of the exception from application of the GST tax provided for in § 1433(b)(2)(A), and it does not support the Sixth Circuit's observation that "the second clause [of § 1433(b)(2)(A)] brings to this court a question that divides three of our sister circuits and the Tax Court below." *Estate of Gerson,* 507 F.3d at 439, App. at 7a.

otherwise be treated under other Code sections. Only by ignoring what the Effective Date Exception actually says was the Sixth Circuit able to find that the regulation represents a "plausible" interpretation of that statute.

Plainly, the import and application of *Brand X Internet Servs.* requires clarification and explication by the Court. Indeed, the Sixth Circuit itself acknowledged that "[t]he full significance of *Brand X* remains unclear . . . ." *Estate of Gerson*, 507 F.3d at 440 n.2, App. at 9a. This case provides the appropriate circumstances to provide the needed clarification. Accordingly, this Court should grant the writ and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

CONCLUSION

Pursuant to the plain and unambiguous language of the Effective Date Exception, the transfer of the property held in Trust A of the Benjamin Gerson Trust by reason of the exercise by Eleanor of the general power of appointment granted her under that trust is not subject to the GST tax under 26 U.S.C. § 2601. The Court should, therefore, grant the requested writ of certiorari and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

MARK D. TUCKER
BENESCH, FRIEDLANDER,
COPLAN & ARONOFF LLP
41 South High Street
26th Floor
Columbus, OH 43215
(614) 223-9300

Counsel for Petitioner

JEFFRY L. WEILER
Counsel of Record
MARK A. PHILLIPS
BENESCH, FRIEDLANDER,
COPLAN & ARONOFF LLP
200 Public Square
Suite 2300
Cleveland, Ohio 44114
(216) 363-4500

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-2582

ESTATE OF ELEANOR R. GERSON, Deceased,
ALLAN D. KLEINMAN, Executor,
Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

On Appeal from the Decision
of the United States Tax Court.
No. 13534-04—Harry A. Haines, Tax Court Judge.

Argued: September 17, 2007
Decided and Filed: November 9, 2007

Before: COLE and COOK, *Circuit Judges*; and FROST, *District Judge*.*

OPINION

COOK, *Circuit Judge*. The Estate of Eleanor R. Gerson appeals the United States Tax Court's decision to assess a tax of $1,144,465 on the proceeds of an irrevocable trust under the generation-skipping transfer ("GST") tax. The Estate asserts that a grandfather clause protects these assets from taxa-

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* The Honorable Gregory L. Frost, United States District Judge for the Southern District of Ohio, sitting by designation.

tion, despite a treasury regulation that would lead to a contrary result. Because the Commissioner's regulation reasonably construes an ambiguous statutory provision, we affirm the Tax Court's decision.

I

Benjamin Gerson created a revocable trust to benefit his wife, Eleanor Gerson, and made his last changes to the instrument in 1973. By its terms the trust became irrevocable when Benjamin died three days later. The trust gave Eleanor the right to use the income during her life and to appoint a beneficiary to receive the corpus when she died. If Eleanor failed to use her appointment power, the corpus would flow into another trust for the benefit of Benjamin's children.

Eleanor died in 2000 with a will exercising the power of appointment and leaving the trust corpus to her grandchildren. After Eleanor's executor filed a tax return for the Estate, the Commissioner of Internal Revenue responded with a notice of deficiency claiming that the transfer triggered the GST tax.

The Gerson Estate brought an action in the Tax Court to challenge the deficiency. The Tax Court ultimately agreed that the Estate owed $1,144,465, prompting this appeal.

II

We review de novo the Tax Court's application of the Internal Revenue Code to undisputed facts. *See Limited, Inc. v. Comm'r*, 286 F.3d 324, 331 (6th Cir. 2002).

The GST tax applies to transfers that skip a generation, such as a transfer from grandparent to grandchild. *See* I.R.C. § 2613(a) (defining a "skip

person" as "a natural person assigned to a generation which is 2 or more generations below the generation assignment of the transferor"). The GST "tax laws were enacted to ensure taxation of generation skipping transfers in a comparable manner to outright transfers from one generation to the next, and to remove the estate planning tool of escaping taxation by skipping a generation in an estate transfer." *Comerica Bank, N.A. v. United States*, 93 F.3d 225, 228 (6th Cir. 1996).

The Estate concedes that the GST tax would ordinarily apply, but cites an effective date provision that grandfathers certain unmodified irrevocable trusts created before 1985. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 1433(b)(2)(A), 100 Stat. 2717, 2731. This provision states that the tax does not apply to "any generation-skipping transfer under a trust which was irrevocable on September 25, 1985, but only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985." *Id.* Because Eleanor never added any assets to the corpus, the Estate asserts that the provision disposes of this case.

But the Commissioner disagrees, reasoning that testators must cast the die before 1985 by including the skip transfer in the trust instrument itself or conferring no more than a limited power of appointment.[1] The IRS embodied this view in a

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[1] The Code defines a general power of appointment as "a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate." I.R.C. § 2041(b)(1). The Code excludes from this definition "[a] power to consume, invade, or appropriate property" if the power "is limited by an ascertainable standard," *id.* § 204 1 (b)(1)(A), as well as some instances of shared power, *id.* § 2041(b)(1)(B)-(C).

regulation, which the Estate challenges as contrary to the plain language of the effective date provision. Treasury Regulation § 26.2601-1(b)(1)(i) provides that the grandfather exception "does not apply to a transfer of property pursuant to the exercise, release, or lapse of a general power of appointment that is treated as a taxable transfer under chapter 11 or chapter 12."

This interpretive regulation was promulgated after notice and comment pursuant to the Treasury Department's general authority to issue regulations under I.R.C. § 7805(a), rather than under a specific statutory grant. The Tax Court highlighted three competing standards of review applicable to such interpretive regulations, *Estate of Gerson v. Comm'r*, 127 T.C. 139, 154 (2006) (in the majority, applying *National Muffler* and *Chevron* standards in the belief the result would be the same under either approach), but this court has faithfully applied *Chevron* deference since abandoning the less deferential *National Muffler* standard in *Peoples Federal Savings & Loan Ass 'n of Sidney v. Commissioner*, 948 F.2d 289, 304-05 (6th Cir. 1991). *See, e.g., Littriello v. United States*, 484 F.3d 372, 376-78 (6th Cir. 2007) (applying *Chevron* deference to interpretive tax regulations); *Hosp. Corp. of Am. v. Comm'r*, 348 F.3d 136, 140–41 (6th Cir. 2003) (same).

Judge Vasquez's dissenting opinion in the Tax Court favored neither *National Muffler* nor *Chevron*, but *Skidmore* deference—which examines various factors, including the regulation's "power to persuade"—because the judge believed *United States v. Mead Corp.*, 533 U.S. 218 (2001), changed the law. *Gerson*, 127 T.C. at 174-75 (Vasquez, J., dissenting); *see generally Skidmore v. Swift & Co.*, 323 U.S. 134,

140 (1944). In *Mead*, the Supreme Court explained that agency interpretations flowing from the agency's general authority merit *Chevron* deference if "Congress delegated authority to the agency generally to make rules carrying the force of law" and "the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-27. The Court ultimately applied the more searching *Skidmore* deference to the tariff ruling letters at issue, in large part because they were not "the fruits of notice-and-comment rulemaking or formal adjudication." *Id.* at 230-31; *see also Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (interpretation contained in opinion letter not entitled to *Chevron* deference).

Although the IRS clearly has the authority to issue statements carrying the force of law, the issue is whether the agency intended to exercise that authority with Treasury Regulation § 26.2601-1(b)(1)(i). For one thing, the IRS regularly engages in notice and comment procedures for its general-authority regulations; these procedures foster "fairness and deliberation." *Mead*, 533 U.S. at 230. For another, the Tax Code penalizes violations of "the provisions of the Internal Revenue Code, temporary or *final Treasury regulations* issued under the Code, and revenue rulings or notices," showing the intent to bind the public to general-authority regulations. Treas. Reg. § 1.6662-3(b)(2) (emphasis added); *see also Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2350-51 (2007) (interpretive regulation that "governs the conduct of members of the public" entitled to *Chevron* deference where the agency used notice-and-comment procedures). Thus, we disagree that *Mead* mandates a less deferential standard than *Chevron* in this case.

Applying this Circuit's favored *Chevron* formulation, we first determine "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Jewish Hosp., Inc. v. Sec'y of Health & Human Servs.*, 19 F.3d 270, 273 (6th Cir. 1994). When it has, we apply the plain language of the statute. *Chevron*, 467 U.S. at 842-43. If faced with ambiguity or silence, we must instead decide whether the agency offers a "permissible construction of the statute." *Id.* at 843.

The first prong of *Chevron* rests on the premise that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9. In construing statutes, our primary goal is to effectuate legislative intent using traditional tools of statutory interpretation. *Fieran v. INS*, 268 F.3d 340, 344 (6th Cir. 2001). Nevertheless, "statutory language is to be read in pertinent context rather than in isolation." *Oates v. Oates*, 866 F.2d 203, 206 (6th Cir. 1989).

The effective date provision excludes "any generation-skipping transfer under a trust which was irrevocable on September 25, 1985, but only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985." Tax Reform Act of 1986 § 1433(b)(2)(A). It is undisputed that the Gerson trust was irrevocable before September 25, 1985.

The Code defines "generation-skipping transfer" to include "(1) a taxable distribution, (2) a taxable termination, and (3) a direct skip." I.R.C. § 2611(a). In this case the facts evidence a direct skip, "a transfer subject to a tax imposed by chapter 11 or 12 of an

interest in property to a skip person." *Id.* § 2612(c)(1). The Estate thus meets the criteria under the provision's first clause.

The next step in the analysis, then, is to decide whether the "transfer is not made out of corpus added to the trust after September 25, 1985." Tax Reform Act of 1986 § 1433(b)(2)(A).

The parties' dispute on this second clause brings to this court a question that divides three of our sister circuits and the Tax Court below. *Compare Bachler v. United States*, 281 F.3d 1078 (9th Cir. 2002), *and Simpson v. United States*, 183 F.3d 812 (8th Cir. 1999) (grandfathering transfer), *with E. Norman Peterson Marital Trust v. Comm'r*, 78 F.3d 795 (2d Cir. 1996) (finding grandfather clause inapplicable). *See also Gerson*, 127 T.C. at 152.

The first court confronted with this quandary emphasized the overall legislative purpose of the GST tax scheme, as well as contextual provisions, to uphold the tax. *See Peterson*, 78 F.3d at 796-97. In *Peterson*, the trust included a power of appointment, but would automatically give the corpus to the grandchildren if the widow did not use her power of appointment. *Id.* at 797. The widow exercised her appointment power only to pay certain taxes, allowing the balance to fall to her grandchildren. *Id.*

Peterson cited two instances in which the Tax Code treats a power of appointment the same as outright ownership. First, a decedent's taxable estate includes assets over which the decedent had a power of appointment on the date of death. I.R.C. § 2041(a)(2); *see also Estate of Kurz v. Comm'r*, 101 T.C. 44, 47-48 (1993) (discussing general power of appointment as part of estate). Second, the exercise, release, or lapse

of an appointment power incurs gift tax liability. *See* I.R.C. § 2514(b), (e). Though for general purposes the holder of the appointment power may not have the right to use the property, the Tax Code treats the power of appointment as if it were full ownership. *See Peterson*, 78 F.3d at 800. Indeed, the holder could use the entire trust to pay her own creditors or taxes upon death.

The Peterson Estate contended that the effective date provision protects broad reliance, a contention the court rejected by analyzing the legislative purpose:

> The rule was not enacted to allow taxpayers who, in good faith and without intent to evade taxes, seek to continue benefitting from a tax advantage that Congress has eliminated. It was designed, instead, to protect those taxpayers who, on the basis of pre-existing rules, made arrangements from which they could not reasonably escape and which, in retrospect, had become singularly undesirable.

Id. at 801.

Unlike the Second Circuit, the Eighth and Ninth Circuits have construed the grandfather provision in favor of the taxpayer. In *Simpson*, an irrevocable trust gave the settlor's wife a power of appointment. 183 F.3d at 813. Like Eleanor, the widow exercised the power of appointment in her will to give the corpus to her grandchildren. *Id.* The IRS first argued that the transfer was not "under" the trust. *See id.* at 814. The Eighth Circuit found this argument "simply untenable." *Id.* The court reasoned that to hold for the IRS, it would have to conclude that "which" modified "transfer," rather than "trust," a gram-

matical feat it did not wish to undertake. *Id.* The court disagreed with the IRS's views on the purpose of the effective date provision, finding that the statute allowed the widow to give the corpus to anyone she wanted without adverse tax consequences. *Id.* at 814-15. In *Bachler*, the Ninth Circuit also applied the exemption, drawing heavily from *Simpson*. *See* 281 F.3d 1078. Both courts distinguished *Peterson* on the grounds that *Peterson* involved a lapse, rather than an exercise of a power of appointment. *Id.* at 1080; *Simpson*, 183 F.3d at 815-16.[2]

We agree with the *Simpson* and *Bachler* courts that the effective date provision breeds "under" cases and "added" cases, but we disagree that exercise and

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[2] The Estate argues that *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), requires us to follow the Eighth Circuit's "plain language" determination. *See id.* at 982 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."). We disagree. *Brand X* confirmed an agency's ability to change policies; it did not hold that prior court interpretations freeze out agency regulation. *See id.* at 982-83 (noting that binding agencies to court rulings would "preclud[e] agencies from revising unwise judicial constructions of ambiguous statutes"). *Simpson*, *Bachler*, and *Peterson* came down while the agency was developing regulations. *Simpson* never held that the statute was so clear that it foreclosed regulation. *See* 183 F.3d at 816. Offering the most compelling rationale, the Tax Court discounted *Brand X*'s application because it did not believe that "conflicting judicial constructions" invoked the rule. *Gerson*, 127 T.C. at 153. The full significance of *Brand X* remains unclear, *see Brand X*, 545 U.S. at 1018–19 (Scalia, J., dissenting), but we are surely not bound by the Eighth and Ninth Circuits.

lapse come to different ends. In the exercise of a power of appointment, two transfers occur. In the first transfer, the appointment power holder becomes the owner of the trust assets for tax purposes. *See* I.R.C. § 2041(a)(2) (including assets over which a decedent has a power of appointment in the decedent's taxable estate). In the second transfer, the holder transfers the assets to a skip person. If the second transfer occurs after the GST tax became effective, tax liability ensues. By contrast, in the lapse of a power of appointment, three transfers occur. The creation of the power of appointment again amounts to a first transfer, but because the holder of the power of appointment never uses the power, the assets flow back through the trust as a second transfer, reaching the skip person in the third transfer from the trust. *See* 26 C.F.R. § 26.2601-1(b)(1)(v)(A) ("[T]he value of the entire portion of the trust subject to the power that was released, exercised, or lapsed is treated as if that portion had been withdrawn and immediately retransferred to the trust at the time of the release, exercise, or lapse."). If the lapse occurs after 1985, liability results because assets were added to the trust corpus after September 25, 1985, per the second clause of the effective date provision. Tax Reform Act of 1986 § 1433(b)(2)(A).

This is an "under" case because Eleanor exercised her power of appointment. The ambiguity of this term—a common word without further definition in the GST scheme—results from the conflict between the Estate's reading that "under" merely implies that the trust instrument is the root of the skip power and the Commissioner's reading that the transfer was not under a trust irrevocable before 1985, but under Eleanor's will. We disagree with the Estate that the

statute has a plain meaning, as both parties offer plausible, contrary interpretations.

III

Recognizing ambiguity, we turn to step two of the *Chevron* test: whether the Commissioner reasonably construed the statute. 467 U.S. at 845. In doing so, we acknowledge that the Treasury Department, not this court, makes tax policy decisions. *See Smith v. Babcock*, 19 F.3d 257, 266 (6th Cir. 1994) ("[W]e seriously doubt that *ad hoc* decisions resulting from federal litigation can rival the wisdom or the legitimacy of the choices made by [administrative] experts.").

Context convinces us the Commissioner made a reasonable choice. As the *Peterson* court recognized, "For tax purposes, a general power of appointment has for many, many years been viewed as essentially identical to outright ownership of the property." 78 F.3d at 800. Thus, the regulation conforms the grandfather clause to other elements of the tax scheme. *See* I.R.C. § 2041(a)(2) (power of appointment included in estate); *id.* § 2514(b) (exercise or release of a general power of appointment incurs gift tax). In addition, the other exceptions to the GST tax surrounding the irrevocable trust provision all represent inescapable contingencies that justify grandfathering, while the Estate's proposed interpretation protects disproportionately broad reliance on prior tax laws. For example, other exceptions protect the decedent who may have an estate plan, but little time to change it after the new tax scheme, *see* Tax Reform Act of 1986 § 1433(b)(2)(B) (excluding a skip under a will "if the decedent dies before January 1, 1987"), or those incompetent to change their wills, *id.* § 1433(b)(2)(C)(ii).

The parties debate the breadth of reliance the legislature intended to protect, but the legislature gave no guidance other than its ambiguous words. The Commissioner could have embraced total reliance on a GST-tax-free scheme; instead, he limited it. *See generally Tataranowicz v. Sullivan*, 959 F.2d 268, 277 (D.C. Cir. 1992) ("[G]randfathering typically seeks to provide special relief for persons on whom the new regime might bear with unusual severity, because it specially disrupts their lives, usually because of decisions they are likely to have taken in reliance on the prior regime."). This is precisely the type of decision entrusted to agency discretion. We recognize that a superficial reading of the effective date provision has fouled several estate plans, but this confusion validates Treasury Regulation § 26.2601-1(b)(1)(i), which alerts estate planners to avoid skipping assets via general powers of appointment.

IV

Deferring to the Commissioner's reasonable interpretation of the grandfather provision, we affirm.

APPENDIX B

127 T.C. No. 11

UNITED STATES TAX COURT

[Filed October 24, 2006]

Docket No. 13534-04

ESTATE OF ELEANOR R. GERSON, Deceased, ALLAN D. KLEINMAN, Executor, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

OPINION

HAINES, *Judge*: Respondent issued a notice of deficiency to the Estate of Eleanor R. Gerson (the estate) determining a deficiency of $1,144,465 in Federal generation-skipping transfer (GST) tax. The sole issue before the Court concerns the validity of section 26.2601-1(b)(1)(i), GST Tax Regs., which provides that the "grandfather" exception to the GST tax set forth in section 1433(b)(2)(A) of the Tax Reform Act of 1986 (TRA 1986), Pub. L. 99-514, 100 Stat. 2085, 2731 (hereinafter TRA 1986 section 1433(b)(2)(A)), does not except from GST tax a transfer of property pursuant to the exercise, release, or lapse of a general power of appointment that is treated as a taxable transfer for purposes of Federal estate or gift tax.[1] We hold the regulation is valid,

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[1] Unless otherwise indicated, section references are to sections of the Internal Revenue Code, as amended, and Rule references are to the Tax Court Rules of Practice and Procedure.

and we sustain respondent's determination that the disputed transfer is subject to GST tax.

Background

This case was submitted to the Court fully stipulated pursuant to Rule 122. The parties' stipulation of facts, with attached exhibits, is incorporated herein by this reference.

Eleanor R. Gerson (decedent) died testate on October 20, 2000. At the time of her death, decedent was domiciled in Cleveland Heights, Ohio. Allan D. Kleinman was duly appointed executor of decedent's estate by the Probate Court for Cuyahoga City, Ohio. At the time the petition was filed, Mr. Kleinman was a resident of Cuyahoga County, Ohio, and in his capacity as executor had a mailing address of 200 Public Square, Suite 2300, Cleveland, Ohio 44114.

Decedent married Benjamin S. Gerson (Mr. Gerson) on November 6, 1938, and remained married to him until his death on July 22, 1973. Decedent and Mr. Gerson had four children and five grandchildren.

On December 9, 1968, Mr. Gerson, as grantor, executed a revocable trust agreement (the Benjamin Gerson Trust). On July 19, 1973, shortly before his death, Mr. Gerson amended the Benjamin Gerson Trust for the last time (the Third amendment). Upon Mr. Gerson's death on July 22, 1973, the Benjamin Gerson Trust, as amended, became irrevocable.

Article III, paragraph A of the Benjamin Gerson Trust, as amended, provided for the division of the trust corpus into three trusts. One of those trusts, Trust A, was a marital trust for the benefit of decedent. Article III, paragraph B of the Benjamin Gerson Trust, as amended, provided for the distri-

bution of the income and principal of Trust A. Specifically, paragraph B.3 of article III provided:

> Upon the death of my said wife, the balance remaining in Trust A, including any income therein received by the Trustee from the time of the last income payment and the date of death of my said wife, shall be distributed by the Trustee to such person or persons, and in such share or shares, in trust or otherwise, as my said wife shall, by her Last Will and Testament, or Codicil thereto, appoint by specific reference thereto. It is my intention that my said wife shall have an unlimited testamentary power of appointment in respect of the whole of Trust A, including the power to appoint the same in favor of her own estate.

The parties agree that this provision of the Benjamin Gerson Trust, as amended, conferred upon decedent a general power of appointment, as that term is defined in section 2041(b).

The accounting records maintained by National City Bank as trustee of the Benjamin Gerson Trust reflect that no additions were made to the corpus of Trust A after September 25, 1985.

On September 24, 1999, decedent executed her will and, as grantor, a revocable trust agreement (the Eleanor Gerson Trust). On September 13, 2000, shortly before her death, decedent amended and restated the Eleanor Gerson Trust.

As of her death on October 20, 2000, decedent was survived by her four children and her five grandchildren.

Item I, paragraph C of the decedent's will provided:

> Under the terms of a certain Trust Agreement dated December 9, 1968, entered into between my spouse, BENJAMIN S. GERSON, AND NATIONAL CITY BANK, Trustee (as modified by my spouse's Third amendment to said Trust Agreement, dated July 19, 1973), specifically at paragraph B.3 of Article III thereof, I am granted a general power to appoint at the time of my death the property held in Trust A of my said spouse's Trust Agreement. I hereby exercise said power of appointment and direct that all property subject thereto shall be allocated to NATIONAL CITY BANK, Trustee, or any successor thereto, under my said 1999 Amended and Restated Revocable Trust Agreement, to be administered pursuant to the terms of *ARTICLE III* thereof (the Grandchildren's Trust) for the benefit of my grandchildren and more remote descendants.

ARTICLE III of the Eleanor Gerson Trust established the Grandchildren's Trust. Under the terms of the Grandchildren's Trust, the corpus of the trust was divided into five equal shares for the benefit of each of her grandchildren. Two of decedent's grandchildren received their shares outright. The shares allocated to the other three grandchildren were held in trust for their respective benefit, to be transferred outright to such grandchild upon the earlier of the grandchild's reaching the age of 40 or the twenty-first anniversary of decedent's death less one day.

Decedent's estate filed a Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, on July 20, 2001, along with a Form 8275-R, Regulation Disclosure Statement, indicating it was

taking a position contrary to section 26.2601-1(b)(1)(i), GST Tax Regs. The corpus of Trust A as of the date of decedent's death is listed as Item 1 on Schedule H of the estate's return and is valued at $6,244,627.16. The estate's return reported a gross estate in the amount of $22,054,002.79, and Federal estate tax in the amount of $7,168,531.02.

As indicated, respondent issued a statutory notice of deficiency to decedent's estate. A timely petition for redetermination was filed with the Court challenging respondent's determination.

Discussion

The parties do not dispute that a transfer from decedent directly to her grandchildren, skipping over decedent's children, normally would be subject to GST. As discussed in detail below, the dispute in this case centers on the transitional relief provided by the "grandfather" exception to the GST tax set forth in TRA 1986 section 1433(b)(2)(A), and the validity of section 26.2601-1(b)(1)(i), GST Tax Regs. The regulation provides that a transfer of property pursuant to the exercise, release, or lapse of a general power of appointment that is treated as a taxable transfer under Federal estate and/or gift tax provisions, is not a "transfer under a trust" that is eligible for transitional relief from GST tax under TRA 1986 section 1433(b)(2)(A).

To frame the issue properly, we briefly outline the GST tax provisions, review pertinent caselaw that preceded the promulgation of section 26.2601-1(b)(1)(i), GST Tax Regs., examine the regulation and the circumstances surrounding its promulgation, and summarize the parties' positions.

I. *The Generation-Skipping Transfer Tax*

The current version of the GST tax, set forth in sections 2601-2664, was enacted under TRA 1986, in which Congress substantively modified and retroactively repealed an earlier GST tax regime enacted in 1976.[2] The GST tax generally is imposed on transfers, whether outright or in trust, to transferees who are at least two generations below the generation of the transferor. Secs. 2611, 2613(a). The public policy underlying the GST tax is to bring uniformity and consistency to Federal transfer taxes (estate, gift, and generation-skipping) by imposing a transfer tax upon all transfers whether directly to an immediate succeeding generation or to generations further removed from the transferor. See *Peterson Marital Trust v. Commissioner*, 78 F.3d 795, 798 (2d Cir. 1996), affg. 102 T.C. 790 (1994); H. Rept. 99-426, at 824, 1986-3 C.B. (Vol. 2) 1, 824.

A generation-skipping transfer is defined to include a taxable distribution, a taxable termination, and a direct skip. Sec. 2611(a). A direct skip means a transfer, subject to Federal estate or gift tax, of an interest in property to a skip person. Sec. 2612(c)(1). A skip person means a natural person assigned to a generation which is two or more generations below the generation of the transferor, or a trust if all interests in such trust are held by skip persons. Secs. 2613(a)(1) and (2), 2651.

In the case of a direct skip (other than a direct skip from a trust), liability for GST tax falls on the transferor. Sec. 2603(a)(3). The term "transferor" means the decedent in the case of any property

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[2] The first generation-skipping transfer tax was enacted as part of the Tax Reform Act of 1976, Pub. L. 94-455, sec. 2006, 90 Stat. 1879-1890.

subject to Federal estate tax. Sec. 2652(a)(1). The flush language of section 2652(a)(1) provides that "An individual shall be treated as transferring any property with respect to which such individual is the transferor."

As a general rule, if a decedent holds a general power of appointment over property at death, the value of such property is included in the decedent's gross estate for Federal estate tax purposes under section 2041. With exceptions not pertinent to our discussion, a general power of appointment means "a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate". Sec. 2041(b)(1).[3]

GST tax generally applies to any generation-skipping transfer made after October 22, 1986. TRA 1986 sec. 1431(a). However, TRA 1986 section 1433(b)(2)(A) provides special transitional rules or "grandfather" provisions excepting certain transfers from the reach of the GST tax. TRA 1986 section 1433 (b) (2) (A) provides:

> (b) Special Rules.—
>
> * * * * *
>
> (2) Exceptions.—The amendments made by this subtitle shall not apply to—
>
> (A) any generation-skipping transfer under a trust which was irrevocable on September 25, 1985, but only to the extent that such transfer

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[3] It follows that a decedent who dies holding a general power of appointment over property is treated as the transferor of that property for purposes of GST tax. See 5 Bittker & Lokken, Federal Taxation of Income, Estates & Gifts, par. 133.2.2 at 133-6 to 133-7 (2d ed. 1993).

> is not made out of corpus added to the trust after September 25, 1985 (or out of income attributable to corpus so added),

September 25, 1985, apparently was selected as the effective date for irrevocable trusts because the House Committee on Ways and Means held a mark-up session on these matters on September 26, 1985. See Staff of the Joint Comm. on Taxation, 99th Cong., Tax Reform Proposals in Connection with Committee on Ways and Means Markup (JCS-44-85) (Sept. 26, 1985).

II. *Caselaw*

Before section 26.2601-1(b)(1)(i), GST Tax Regs. (discussed below) was promulgated, this Court and others opined on the applicability of the transitional or effective date provisions of TRA 1986 section 1433 (b) (2) (A) .

A. *Peterson Marital Trust v. Commissioner*

In *Peterson Marital Trust v. Commissioner*, 102 T.C. 790 (1994), affd. 78 F.3d 795 (2d Cir. 1996), we were asked to decide the validity of a regulation which provided that the lapse of a general power of appointment resulted in a "constructive" addition to the trust after the effective date of the GST tax. In that case, E. Norman Peterson died in 1974 and left a will providing for the creation of a marital trust under which his wife (Mrs. Peterson) was entitled to receive all of the income and to withdraw one-half of the trust principal during her lifetime. Mrs. Peterson also was given a testamentary general power of appointment over the corpus of the marital trust. Under Mr. Peterson's will, if Mrs. Peterson did not exercise her power of appointment, the trust principal would be set aside in equal shares for Mr. Peterson's grandchildren.

Mrs. Peterson did not exercise her right to withdraw from the principal of the trust, and she did not exercise her general power of appointment over the trust corpus (except as to an amount necessary to pay estate tax attributable to the trust). As a result, at the time of Mrs. Peterson's death, most of the trust property passed to Mr. Peterson's grandchildren.

The Commissioner determined the transfers to Mr. Peterson's grandchildren were subject to GST tax. The Peterson Marital Trust (the taxpayer) challenged the Commissioner's determination and asserted the transfers qualified for transitional relief from GST under TRA 1986 section 1433(b)(2)(A). The taxpayer argued "Because the Marital Trust was irrevocable on September 25, 1985 * * * the subsequent transfers from that trust upon Mrs. Peterson's death are exempt from the GST tax." *Peterson Marital Trust v. Commissioner*, 102 T.C. at 796. The Commissioner maintained the taxpayer was not eligible for transitional relief under TRA 1986 section 1433(b)(2)(A) because the lapse of Mrs. Peterson's general power of appointment resulted in a "constructive" addition of corpus to the trust after September 25, 1985, within the meaning of the statute. The Commissioner relied upon section 26.2601-1(b)(1)(v)(A), Temporary GST Tax Regs., 53 Fed. Reg. 8445 (Mar. 15, 1988), amended by 53 Fed. 18839 (May 25, 1988).[4] The

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[4] Sec. 26.2601-1(b)(1)(v)(A), Temporary GST Tax Regs., 53 Fed. Reg. 8445 (Mar. 15, 1988), provided in pertinent part:

> where any portion of a trust remains in the trust after the release, exercise, or lapse of a power of appointment over that portion of the trust, * * * the value of the entire portion of the trust subject to the power that was released, exercised, or lapsed will be treated as an addition to the trust.

taxpayer in turn asserted the temporary regulation was invalid on the ground it was contrary to the plain meaning of TRA 1986 section 1433(b)(2)(A).

Upon review of the matter, we initially observed TRA 1986 section 1433(b)(2)(A) did not define the term "added to the trust" and neither the provision nor its legislative history contained any specific guidance whether a lapse of a general power of appointment constituted a constructive addition to the corpus of a trust. *Peterson Marital Trust v. Commissioner*, 102 T.C. 798-799. Nevertheless, we gleaned from the effective date provisions a congressional intention to "grandfather" certain irrevocable trusts to protect the "reliance interests" of trust settlors who established trusts before the new GST tax regime was introduced. *Id.* at 799. We elaborated on this point as follows:

> The effective date rules of TRA 1986 section 1433(b)(2)(A) were apparently intended to "grandfather" trusts that were irrevocable prior to the date the House Ways and Means Committee began consideration of the bill containing the GST tax provisions. The most logical explanation for this grandfather clause is to protect the reliance interests of trust settlors who established irrevocable trusts prior to the legislative introduction of the GST tax regime eventually enacted by TRA 1986. See *Tataranowicz v. Sullivan*, 959 F.2d 268, 277 (D.C. Cir. 1992); *Sercl v. United States*, 684 F.2d 597, 599 (8th Cir. 1982).
>
> As a corollary to its protection of reliance interests, the grandfather clause does not apply to transfers "made out of corpus added to the [grandfathered] trust after September 25, 1985".

TRA 1986 sec. 1433(b)(2)(A). Unlike a person who has irrevocably transferred money to a trust prior to the grandfathering date, a person who effects a transfer of corpus to a grandfathered trust after that date is aware of (or should be aware of) the effects of the GST tax. *Absent a restriction on post-grandfather-date transfers, an individual could utilize an existing grandfathered trust as a vehicle for passing additional amounts to skip persons free of GST tax, even though these additional amounts had not been irrevocably committed to such a transfer as of September 25, 1985.* Such a result would be contrary to the reliance purpose underlying the grandfather clause. * * *

Section 26.2601-1(b)(1)(v)(A), Temporary GST Tax Regs., *supra*, is consistent with the reliance purpose underlying TRA 1986 section 1433(b)(2)(A), and is therefore valid. *A person who holds a general power of appointment over trust property maintains control over the ultimate disposition of that property and is, in practical effect, in a position similar to the actual owner of the property. Estate of Kurz v. Commissioner*, 101 T.C. 44, 50-51, 59-60 (1993), supplemented by T.C. Memo. 1994-221. This is the rationale underlying the inclusion of such property in the gross estate of the holder of the power for purposes of the Federal estate tax. *Id.*

Mrs. Peterson, as the holder of a testamentary general power of appointment, maintained effective control over the disposition of the property in the Marital Trust until her death in 1987. Had she chosen to do so, Mrs. Peterson could have exercised the general power of appointment to

> cause the trust property to be distributed to persons other than the Grandchildren's Trusts, thereby avoiding a generation-skipping transfer. Accordingly, as of the September 25, 1985, grandfather date, the corpus of the trust was not irrevocably required to be distributed to the Grandchildren's Trusts.

Id. at 799-801 (emphasis added; fn. ref. omitted). Consistent with the foregoing, we held the temporary regulation, which established that a lapse of a general power of appointment would result in a constructive addition to a trust, was a reasonable and valid interpretation of TRA 1986 section 1433(b)(2)(A), and the transfers to Mr. Peterson's grandchildren were subject to GST tax.

The taxpayer appealed this Court's decision to the Court of Appeals for the Second Circuit. In affirming our decision, the Court of Appeals emphasized TRA 1986 section 1433(b)(2)(A) must be interpreted in proper context. *Peterson Marital Trust v. Commissioner*, 78 F.3d at 796, 799. The Court of Appeals observed the exercise, release, or lapse of a general power of appointment is viewed as "essentially identical to outright ownership" of the underlying property by the power holder for purposes of Federal estate and gift taxes. *Id.* at 799-800. Applying this "ownership" principle consistently in the context of the GST tax, the Court of Appeals held that a transfer of property as the result of the lapse of a general power of appointment should be treated as if the power holder received and then added property to the trust within the meaning of TRA 1986 section 1433(b)(2)(A). Holding that the constructive addition principle embodied in section 26.2601-1(b)(1)(v)(A), Temporary GST Tax Regs., *supra*, was a reasonable

construction of the statute, the Court of Appeals rejected the taxpayer's argument the word "added" in TRA 1986 section 1433(b)(2)(A) should be interpreted according to its ordinary, literal meaning (thus requiring an actual increase in the size of the trust as opposed to a constructive addition to the trust). *Peterson Marital Trust v. Commissioner*, 78 F.3d at 800.

The Court of Appeals also rejected the taxpayer's argument the regulation in question was invalid because it did not comport with the purpose of the effective date provisions. The taxpayer argued Mrs. Peterson allowed her power of appointment to lapse in an innocent effort to honor her husband's wishes and no elaborate legal maneuvers were employed in carrying out the transfers. The Court of Appeals responded as follows:

> The [effective date] rule was not enacted to allow taxpayers who, in good faith and without intent to evade taxes, seek to continue benefitting from a tax advantage that Congress has eliminated. It was designed, instead, to protect those taxpayers who, on the basis of pre-existing rules, made arrangements from which they could not reasonably escape and which, in retrospect had become singularly undesirable.[6] By giving Mrs.

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[6] This understanding of the purpose behind the effective date rule is underscored by the other provisions of the rule. First, the rule provided that the GST would not apply to transfers made by wills that had been executed before the date of enactment of the GST (October 22, 1986) if the decedent died before January 1, 1987. Pub. L. 99-514, §1433(b)(2)(B). This exception ensured that an in-

> dividual who did not have a reasonable time between the enactment of the law and his death to alter his will would not be penalized by the new provision. Second, the effective date rule allowed an exception for any individual who was 'under a mental disability to change the disposition of his property and did not regain his competence to dispose of such property before the date of his death.' Pub. L. 99-514, §1433 (b)(2)(C).

Id. at 801-802 (emphasis added).

* * * * *

> Peterson a general power of appointment over the trust, Mr. Peterson created an arrangement which was desirable under then-existing tax laws and which could be reworked completely should the laws change, as they in fact did. There is no reason to "grandfather" such a mutable arrangement, and Congress has given no indication that it wished to do so.
>
> Mr. Peterson did not tie himself or his heirs up at all. He gave Mrs. Peterson a power over the trust that was great enough to undo any harm that stemmed from reliance on the absence of a GST at the time the trust was created. It is this fact that, in the end, not only gives additional support to the view that the Treasury Regulation on constructive additions is a reasonable one, but also negates all of the taxpayer's arguments that on "policy grounds" the exemption should apply in this case.

B. *Simpson v. United States*

In *Simpson v. United States*, 183 F.3d 812 (8th Cir. 1999), revg. and remanding 17 F. Supp. 2d 972 (W.D. Mo. 1998), the Court of Appeals for the Eighth Circuit addressed a factual scenario nearly identical

to the instant case and held a transfer to grandchildren pursuant to the exercise of a general power of appointment was eligible for transitional relief from GST tax under TRA 1986 section 1433(b)(2)(A).

The facts in *Simpson* are as follows. Mr. Simpson died in 1966 and left a will creating a testamentary trust primarily for the benefit of his wife, Mrs. Bryan. The trust gave Mrs. Bryan a general power of appointment by will. Mrs. Bryan died in 1993 and left a will in which she exercised her power of appointment in favor of her grandchildren. The Commissioner determined the transfer to the grandchildren was subject to GST tax, and the District Court granted the Commissioner's motion for summary judgment, holding TRA 1986 section 1433(b)(2)(A) did not apply to relieve the taxpayer of liability.

On appeal, the Court of Appeals for the Eighth Circuit reversed, holding the transfer to the grandchildren constituted a "transfer under a trust which was irrevocable on September 25, 1985" within the plain meaning of the language of TRA 1986 section 1433(b)(2)(A). The Court of Appeals stated:

> Trust A, having been created by Mr. Simpson's will in 1966, was of course irrevocable on September 25, 1985. Was the transfer made by Mrs. Simpson a transfer 'under' this trust? We do not see how an affirmative answer can be avoided. The power of appointment that made the transfer possible was created by the trust. Language has to mean something, and the argument that this particular transfer was not 'under' trust A is simply untenable. [*Simpson v. United States, supra* at 814-815.]

In so holding, the Court of Appeals rejected the Commissioner's argument that the relevant action for

purposes of TRA 1986 section 1433(b)(2)(A) was Mrs. Bryan's exercise of her power of appointment (after October 22, 1986). In particular, the Court of Appeals concluded the relevant action under the express language of TRA 1986 section 1433(b)(2)(A) was whether the trust became irrevocable on or before September 25, 1985. The Court of Appeals reasoned as follows:

> The point is that when the trust was created and became irrevocable Mrs. Bryan was given the authority, under the law as it then existed, to exercise her general power of appointment in favor of anyone at all, and to do so without subjecting the transfer to a GST tax, such a tax then being far in the future. This is the sort of reliance that the effective-date provision protects. [*Simpson v. United States, supra* at 814-815.]

As a final matter, the Court of Appeals rejected the Commissioner's reliance on *Peterson Marital Trust*, distinguishing that case on the grounds (1) it concerned the lapse of a power of appointment (as opposed to the exercise of a power of appointment), and (2) the Commissioner had relied upon a temporary Treasury regulation in *Peterson Marital Trust*, whereas there was no regulation applicable to the transfer in dispute in the *Simpson* case. *Simpson v. United States*, 183 F.3d at 815-816.

C. *Bachler v. United States*

In *Bachler v. United States*, 281 F.3d 1078 (9th Cir. 2002), revg. and remanding 126 F. Supp. 2d 1279 (N.D. Cal. 2000), another case presenting a scenario nearly identical to the instant case, the Court of Appeals for the Ninth Circuit followed the holding of

the Eighth Circuit in *Simpson* and held the disputed transfer to the Bachler grandchildren was eligible for relief from the GST tax under TRA 1986 section 1433(b)(2)(A).

The disputed transfer in *Bachler* occurred in 1997, and, therefore, the Court of Appeals declined to address the validity of section 26.2601-1(b)(1)(i), GST Tax Regs. (discussed below), which was not in effect until a later date.

III. *Section 26.2601-1(b)(1)(i), GST Tax Regs.*

We now turn to the regulation at issue in this case—a regulation that was amended in response to the Eighth Circuit's decision in the *Simpson* case. Section 26.2601-1(b)(1)(i), GST Tax Regs., originally was promulgated in 1995 and closely tracked the language of TRA 1986 section 1433(b)(2)(A). The reg ulation stated in pertinent part:

> (b) Exceptions—(1) Irrevocable trusts-(i) In general. The provisions of chapter 13 do not apply to any generation-skipping transfer under a trust (as defined in section 2652(b)) that was irrevocable on September 25, 1985. The rule of the preceding sentence does not apply to a pro rata portion of any generation-skipping transfer under an irrevocable trust if additions are made to the trust after September 25, 1985. * * *

See T.D. 8644, 1996-1 C.B. 200, 207.

In November 1999, several months after the Eighth Circuit issued *Simpson*, the Secretary proposed to amend section 26.2601-1(b)(1)(i), GST Tax Regs. See 64 Fed. Reg. 62997 (Nov. 18, 1999). The Treasury Department's notice of proposed rulemaking included

a discussion and comparison of *Peterson Marital Trust and Simpson*, and articulated the view that (1) there was no substantive difference in the cases, and (2) *Simpson* was wrongly decided. See *id.* at 62999. The proposed amendment was adopted and promulgated in final form on December 20, 2000. See T.D. 8912, 2001-1 C.B. 452. Section 26.2601-1(b)(1)(i), GST Tax Regs., now states in pertinent part:

> (b) Exceptions.(1) Irrevocable trusts. (i) In general. The provisions of chapter 13 do not apply to any generation-skipping transfer under a trust (as defined in section 2652(b)) that was irrevocable on September 25, 1985. * * * Further, the rule in the first sentence of this paragraph (b)(1)(i) does not apply to a transfer of property pursuant to the exercise, release, or lapse of a general power of appointment that is treated as a taxable transfer under chapter 11 or chapter 12. The transfer is made by the person holding the power at the time the exercise, release, or lapse of the power becomes effective, and is not considered a transfer under a trust that was irrevocable on September 25, 1985. * * *

In sum, section 26.2601-1(b)(1)(i), GST Tax Regs., recites the general transitional rule set forth in TRA 1986 section 1433(b)(2)(A) and excepts from the rule a transfer of property pursuant to the exercise, release, or lapse of a general power of appointment if that transfer is treated as a taxable transfer by the power holder for purposes of Federal estate or gift taxes. Section 26.2601-1(c), GST Tax Regs., provides

that the amended portion of the regulation is applicable on and after November 18, 1999.[5]

IV. *The Parties' Positions*

Petitioner relies on the Eighth and Ninth Circuit cases, *Simpson* and *Bachler*, for the proposition that the plain and unambiguous language of TRA 1986 section 1433(b)(2)(A) excepts the transfer in dispute from GST tax, inasmuch as decedent's exercise of her general power of appointment under the Benjamin Gerson Trust in favor of her grandchildren constituted a "generation-skipping transfer under a trust that was irrevocable on September 25, 1985". Petitioner maintains section 26.2601-1(b)(1)(i), GST Tax Regs., is an invalid attempt by the Secretary to "re-write the statute and to override the judicial construction of the statute's plain language".[6] As petitioner sees it, TRA 1986 section 1433(b)(2)(A) was intended to protect the reliance interest of a grantor of a trust that was irrevocable on September 25, 1985--that is, Congress intended such grantors could be assured any transfer from an irrevocable trust would not be subjected to GST tax.

Respondent maintains section 26.2601-1(b)(1)(i), GST Tax Regs., is a reasonable and valid interpretation of TRA 1986 section 1433(b)(2)(A). Respondent avers TRA 1986 section 1433(b)(2)(A) is

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[5] We note that decedent last amended and restated the Eleanor Gerson Trust on Sept. 13, 2000, some 10 months after the Secretary first proposed to amend the regulation in dispute.

[6] In connection with this point, petitioner contends TRA 1986 sec. 1433(b)(2)(A) was carefully drafted to except from the GST tax any transfer under a trust that was irrevocable on Sept. 25, 1985, with one narrow exclusion for transfers made out of corpus added to the trust after Sept. 25, 1985.

silent regarding the proper treatment of transfers from irrevocable trusts pursuant to the exercise of a general power of appointment, and section 26.2601-1(b)(1)(i), GST Tax Regs., reasonably fills the statutory gap. Relying on the Second Circuit opinion in *Peterson Marital Trust* for the general proposition the transitional relief provided in section 1433(b)(2) was intended to protect taxpayers who "relying on preexisting rules, made arrangements from which they could not reasonably escape", respondent asserts section 26.2601-1(b)(1)(i), GST Tax Regs., is a reasonable interpretation of TRA 1986 section 1433(b)(2)(A). In respondent's view, the regulation correctly focuses on whether a generation-skipping transfer was mandated under a trust that was irrevocable on September 25, 1985, not (as petitioner contends) on whether the trust was irrevocable on September 25, 1985. Respondent reasons that, because the disputed generation-skipping transfers in this case were not required or mandated under the trust, but were made at the decedent's election and pursuant to the exercise of a general power of appointment under which decedent was deemed to be the owner of the property for purposes of the Federal estate tax, the transfers are not eligible for exemption from the GST tax under TRA 1986 section 1433 (b) (2) (A).

V. *Analysis*

This case presents a question of first impression concerning the validity of section 26.2601-1(b)(1)(i), GST Tax Regs. We evaluate the validity of the regulation against the plain language of TRA 1986 section 1433(b)(2)(A), its origin, and its purpose. Our analysis is informed in part by caselaw interpreting the statute. This case is appealable to the Court of

Appeals for the Sixth Circuit, which to our knowledge has not had occasion to address TRA 1986 section 1433(b)(2)(A) or regulations related thereto.

We note at the outset that the Secretary promulgated section 26.2601-1(b)(1)(i), GST Tax Regs., after the Commissioner received an adverse decision from the Eighth Circuit in *Simpson*. In *Natl. Cable & Telecomm. Association v. Brand X Internet Servs.*, 545 U.S. 967, ___, 125 S. Ct. 2688, 2700 (2005), the Supreme Court stated:

> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.

As previously discussed, the Eighth Circuit based its holding in *Simpson* on the plain meaning of the phrase "transfer under a trust" contained in TRA 1986 section 1433(b)(2)(A), whereas this Court and the Second Circuit in *Peterson Marital Trust* held that the same statute must be read in proper context. Where, as here, the Secretary was confronted with what we consider conflicting judicial constructions of TRA 1986 section 1433(b)(2)(A), we do not believe the Supreme Court's statement in *Natl. Cable & Telecomm. Association* curtailed the Secretary's discretion to promulgate the regulation in dispute or mandates a holding in this case that *Simpson* trumps the regulation in dispute.

Section 26.2601-1(b)(1)(i), GST Tax Regs., is a Federal interpretative tax regulation promulgated under the general authority vested in the Secretary by section 7805(a). Although entitled to considerable

weight, interpretative tax regulations are accorded less deference than legislative regulations issued under a specific grant of authority. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984); *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982). When this Court reviews an interpretative tax regulation, we generally apply the analysis set forth by the Supreme Court in *Natl. Muffler Dealers Association v. United States*, 440 U.S. 472 (1979). Under *Natl. Muffler Dealers Association*, an interpretative regulation is valid if it implements a congressional mandate in a reasonable manner. *Id.* at 476-477; see *United States v. Vogel Fertilizer Co., supra* at 24 (quoting *United States v. Correll*, 389 U.S. 299, 307 (1967)). In *Natl. Muffler Dealers Association v. United States, supra* at 477, the Supreme Court stated:

> In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.

In *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., supra*, the Supreme Court enunciated the following two-part analysis applicable to judicial review of an agency's construction of a statute:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. [*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., supra* at 842-843; fn. refs. and citations omitted.]

In the case before us, we conclude it is unnecessary to attempt to discern any substantive difference between *Natl. Muffler Dealers Association* and *Chevron U.S.A., Inc.* because we conclude the result here would be the same under either standard. See *Swallows Holding, Ltd. v. Commissioner*, 126 T.C. 96, 131 (2006).

In evaluating the validity of section 26.2601-1(b)(1)(i), GST Tax Regs., we first consider whether Congress has directly spoken to the precise question at issue. Inasmuch as TRA 1986 section 1433(b)(2)(A)

does not define the phrase "transfer under a trust", we do not believe that Congress has directly spoken to the precise question at issue here; i.e., the proper treatment under the GST tax effective-date provisions of transfers effected pursuant to the exercise, release, or lapse of a general power of appointment. As previously discussed, the Eighth and Ninth Circuits in *Simpson* and *Bachler*, respectively, have held the plain language of TRA 1986 section 1433(b)(2)(A) excepts from GST tax a generation-skipping transfer effected pursuant to the exercise of a general power of appointment under a trust that was irrevocable on September 25, 1985. We respectfully disagree with the holdings in these two cases. Instead, we adhere to the view, articulated by the Second Circuit in *Peterson Marital Trust*, that the words of TRA 1986 section 1433(b)(2)(A) "can only be given meaning in a particular context". *Peterson Marital Trust v. Commissioner*, 78 F.3d at 799.[7] Consistent with *Natl. Muffler Dealers Association* and *Chevron U.S.A., Inc.*, we do not evaluate the validity of section 26.2601-1(b)(1)(i), GST Tax Regs., by examining the plain language of TRA 1986 section 1433(b)(2)(A) in a vacuum—we also are obliged to consider the origin and purpose of the statute.

Our review of the legislative history of TRA 1986 as it pertains to the question presented reveals two matters that warrant discussion. First, as we comprehend statements by the Committee on Ways and Means (the Committee) in H. Rept. 99-426, at 820, 1986-3 C.B. (Vol. 2) at 820, describing then-present law, under the heading "Overview", the Committee understood the GST tax was imposed on a

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[7] Cf. *Greenpeace, Inc. v. Waste Techs. Indus.*, 9 F.3d 1174, 1179-1181 (6th Cir. 1993).

transfer from a trust which specifically provided for distributions to a generation at least two generations removed from the grantor. This viewpoint is reiterated in H. Rept. 99-426, at 821, 1986-3 C.B. (Vol. 2) at 821, under the heading "Generation assignment", which states in pertinent part: "A generation-skipping trust is a trust having two or more generations of 'beneficiaries' who belong to generations which are 'younger' than the generation of the grantor of the trust." Significantly, nothing in the committee reports suggests that, when Congress referred to "transfers under a trust", it ever contemplated or considered a volitional generation-skipping transfer arising from the exercise of a general power of appointment as opposed to a specific transfer by the settlor to identified persons.

Second, in H. Rept. 99-426, *supra* at 824, 1986-3 C.B. (Vol. 2) at 824, the Committee stated, under the heading "Reasons for Change":

> The committee believes, as it stated when the generation-skipping transfer tax originally was enacted in 1976, that *the purpose of the three transfer taxes (gift, estate, and generation-skipping) is not only to raise revenue, but also to do so in a manner that has as nearly as possible a uniform effect.* This policy is best served when transfer tax consequences do not vary widely depending on whether property is transferred outright to immediately succeeding generations or is transferred in ways that skip generations. * * * The bill accomplishes the committee's goal of simplified administration while ensuring that *transfers having a similar substantial effect will*

be subject to tax in a similar manner. [Emphasis added.]

To paraphrase, the Committee expressed its intention that (1) Federal transfer taxes generally should be applied as uniformly as possible, and (2) generation-skipping transfers having a similar substantial effect should be taxed in a similar manner.

In *Peterson Marital Trust v. Commissioner*, 98 F.3d at 800, the Second Circuit concluded the regulation in dispute therein was a reasonable interpretation of TRA 1986 section 1433(b)(2)(A) because the regulation ensured that general powers of appointment would be treated consistently; i.e., treated as outright ownership of the property for purposes of all Federal transfer taxes, which harmonized with the origin and purpose of the statute.

Section 26.2601-1(b)(1)(i), GST Tax Regs., harmonizes with the origin and purpose of TRA 1986 section 1433(b)(2)(A) and achieves the consistency and uniformity Congress sought. By excluding transfers arising from the exercise of a general power of appointment from the transitional relief provided in TRA 1986 section 1433(b)(2)(A) for "transfers under a trust", the regulation ensures that general powers of appointment are uniformly treated as the equivalent of outright ownership by the power holder. In other words, the regulation is consistent with the general proposition under the GST tax regime that a decedent who dies holding a general power of appointment over property is treated as the "transferor" of that property for purposes of GST tax. Secs. 2603(a)(3), 2652(a)(1); 5 Bittker & Lokken, Federal Taxation of Income, Estates & Gifts, par. 133.2.2 at 133-6 to 133-7 (2d ed. 1993). The regulation also promotes uniformity by ensuring that generation-

skipping transfers arising from the *lapse* of a power of appointment on the one hand, and generation-skipping transfers arising from the *exercise* of a power of appointment on the other, are taxed in a similar manner.[8]

We also must not lose sight of the particular purpose of the statute. As the Second Circuit discussed in *Peterson Marital Trust v. Commissioner*, 78 F.3d at 801-802 n.6, the transitional rules set forth in section 1433(b)(2) are so-called grandfather provisions designed to protect taxpayers who, on the basis of pre-existing rules, made estate-planning arrangements from which they could not reasonably escape and which would otherwise generate GST tax liability. The generation-skipping transfers in the present case are not transfers the transitional rules were intended to protect. Mr. Gerson did not structure his irrevocable trust in a manner that tied the hands of his heirs, nor was decedent required to make the disputed generation-skipping transfers. To the contrary, Mr. Gerson gave the decedent the flexibility to transfer trust property to anyone of her

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[8] In *Simpson v. United States*, 183 F.3d 812, 815-816 (8th Cir. 1999), the Court of Appeals for the Eighth Circuit distinguished *Peterson Marital Trust v. Commissioner*, 78 F.3d 795 (2d Cir. 1996), in part because the latter case concerned a lapse of a power of appointment, which was treated as resulting in a constructive addition to the trust. Considering that the holder of general power of appointment is treated as having the same outright "ownership" interest for purposes of Federal transfer taxes, see secs. 2041 (estate tax), 2514(b) (gift tax), we fail to see any meaningful difference for present purposes whether in the end there is a lapse, exercise, or release of the power. See Harrington et al., Generation Skipping Transfer Tax, par. 7.03[5][b][i] (2d ed. 2001) (questioning the Eighth Circuit's attempt at distinguishing *Peterson Marital Trust*).

choosing. Decedent, who was aware or should have been aware of the regulation in dispute, nevertheless exercised her general power of appointment to effect a generation-skipping transfer.

Considering all the factors discussed above, we hold section 26.2601-1(b)(1)(i), GST Tax Regs., is a reasonable and valid interpretation of the plain language of TRA 1986 section 1433(b)(2)(A). The regulation harmonizes with the plain language of the statute, its origin, and its purpose. *Natl. Muffler Dealers Association v. United States*, 440 U.S. at 477. Accordingly, we sustain respondent's determination that decedent's transfer to her grandchildren was subject to GST tax.

To reflect the foregoing,

Decision will be entered for respondent.

Reviewed by the Court.

COHEN, SWIFT, HALPERN, THORNTON, GOEKE, and KROUPA, *JJ.*, agree with this majority opinion.

CHIECHI, *J.*, concurs in result only.

FOLEY, *J.*, did not participate in the consideration of this opinion.

SWIFT, *J.*, concurring: The majority opinion is too circumspect in discussing the erroneous interpretations of section 1433(b)(2)(A) of the Tax Reform Act of 1986 (TRA 1986), Pub. L. 99-514, 100 Stat. 2731, by the Courts of Appeals in *Simpson v. United States*, 183 F.3d 812 (8th Cir. 1999), and in *Bachler v. United States*, 281 F.3d 1078 (9th Cir. 2002).

In the above opinions, the Courts of Appeals for the Eighth and Ninth Circuits make at least two serious mistakes: (1) They merge and confuse the relevant transfers that are to be considered under the grandfather exception of section 1433(b)(2)(A); and (2) they improperly distinguish and limit *Peterson Marital Trust v. Commissioner*, 78 F.3d 795 (2d Cir. 1996), affg. 102 T.C. 790 (1994).

(1) *The Relevant Transfers*

The Court of Appeals for the Eighth Circuit in *Simpson v. United States, supra* at 813, begins its analysis by correctly stating that—

> the general rule [of section 1433] * * * would apply [the GST tax] to any transfer taking place after the enactment of the statute * * * .

In the very next paragraph of its opinion, however, the Court of Appeals merges the transfer that took place in that case after September 25, 1985, with the earlier transfer that took place therein in 1966 when the trust was created and the corpus was transferred to the trust. The opinion states—

> The power of appointment that made the [post-September 25, 1985] transfer possible was created by the trust. Language has to mean something, and the argument that [the post-September 25, 1985, transfer] * * * was not

> "under" [the trust] * * * is simply untenable. [*Id.* at 814.]

Certainly, in *Simpson* the creation of the trust in 1966 made "possible" the later, actual transfer that occurred in 1993. But the "possibility" in 1966 of a later transfer and the "fact" of the transfer in 1993 are two different things. In their analyses, the Courts of Appeals for the Eighth and Ninth Circuits seem erroneously to merge the creation of the possibility of a transfer to grandchildren (via a transfer to a surviving spouse of a general power of appointment) with the fact of a later, actual transfer to grandchildren, as if they constituted the same transfer.

In both *Simpson* and in *Bachler* the surviving spouse's testamentary exercise of a general power of appointment, and thereby the post-September 25, 1985, skip transfers to grandchildren, were "made possible under" the trusts, but the skip transfers did not "occur under" the trusts. They occurred under the general power of appointment given to the surviving spouse by the trust creator, the predeceased husband. Under that general power of appointment, the surviving spouse need not have made skip transfers and could have transferred the property to anyone she wished.

The only relevant transfer of property that occurred "under" the trust was effectively made to the surviving spouse upon creation of the trust and the grant to her of a general power of appointment. Thereafter, the surviving spouse made a separate, independent, discretionary, and subsequent skip transfer of property to grandchildren, which transfer was made and occurred under the general power of appointment, not under the trust.

Under a proper understanding of TRA 1986 section 1433(b)(2)(A) of the general power of appointment transferred to Mrs. Gerson, and of the property transfer that occurred when Mrs. Gerson exercised her general power of appointment, the result reached by the majority herein is correct and should be reached even if the regulations at issue had never been promulgated.

(2) *The Second Circuit's Opinion in Peterson Marital Trust*

In *Peterson Marital Trust v. Commissioner, supra*, the Court of Appeals for the Second Circuit held that the mere lapse of a general power of appointment held by a surviving spouse and the resulting transfer of property to a skip generation triggered a post-September 25, 1985, taxable generation-skipping transfer. If the mere lapse of a general power of appointment triggers a taxable generation-skipping transfer of property, certainly it should follow that the affirmative exercise of a general power of appointment in favor of a skip generation triggers a taxable generation-skipping transfer of property.

Rather than distinguishable, as the Courts of Appeals for the Eighth and Ninth Circuits concluded, see *Simpson v. United States*, 183 F.3d at 815; *Bachler v. United States*, 281 F.3d at 1080, the post September 25, 1985, exercise of general powers of appointment that were involved in *Simpson* and in *Bachler* are more egregious, or rather, are more obvious post-September 25, 1985, independent and discretionary transfers of property subject to the GST tax than was the deemed transfer involved in *Peterson Marital Trust v. Commissioner*, 78 F.3d 795 (2d Cir. 1996). Accordingly, the transfer that occurred in this case (and in *Simpson* and in *Bachler*) would

appear to be a clearer case for application of the GST tax than the transfer in *Peterson Marital Trust*, since the surviving spouse herein affirmatively made a generation-skipping transfer, while the spouse in *Peterson Marital Trust* did so only by default. See Harrington & Acker, Estates, Gifts, and Trusts: Generation Skipping Tax, 850 Tax Mgmt. (BNA), A-73 (2002).

The interpretations of TRA 1986 section 1433(b)(2)(A) that are reflected in the *Peterson Marital Trust* opinions of this Court and of the U.S. Court of Appeals for the Second Circuit, that are reflected in the various versions of Treasury regulations that have been promulgated over the years, and also the interpretation reflected in the majority opinion herein, are consistent and uniform. Under those interpretations, post-September 25, 1985, exercises of general powers of appointment in favor of skip donees do not qualify for the TRA 1986 section 1433(b)(2)(A) grandfather provision, and they trigger the GST tax.

Peterson Marital Trust is not distinguishable and supports the majority's opinion herein.

Respectfully, in the above two respects the United States Courts of Appeals for the Eighth and the Ninth Circuits in *Simpson* and in *Bachler* erred in their analyses of TRA 1986 section 1433 (b) (2) (A) .

A few concluding comments are appropriate. It has been recently suggested that the Secretary and respondent are misusing their administrative regulatory authority to "bootstrap" (Judge Laro's dissent, *infra* p. 50 note 1) or overcome a "failed litigating position" (*Swallows Holding v. Commissioner*, 126 T.C. 96, 148 (2006)). In my opinion, these suggestions are inappropriate and incorrect.

Under section 7805(a), Congress has given the Secretary and respondent important authority and responsibility to assist in the administration of our Federal income tax laws through the promulgation of regulations. The suggestion that the Secretary and respondent are somehow misusing this authority and responsibility undermines their important role in this regard.

Also, the suggestion calling into question the Secretary's and respondent's motive in promulgating the particular regulation involved herein is inaccurate, as was the similar suggestion in *Swallows Holding v. Commissioner, supra* at 136, 138, 147-148. Section 26.2601-1(b)(1)(i), GST Tax Regs., was promulgated in 2000, T.D. 8912, 2001-1 C.B. 452, after respondent's interpretation of the statutory transition rule of section 1433(b)(2)(A) had been accepted by the Court of Appeals for the Second Circuit in *Peterson Marital Trust v. Commissioner*, 78 F.3d 795 (1996), by two District Courts in *Bachler v. United States*, 126 F. Supp. 2d 1279 (N.D. Cal. 2000), and *Simpson v. United States*, 17 F. Supp. 2d 972 (W.D. Mo. 1998), and by this Court in *Peterson Marital Trust v. Commissioner*, 102 T.C. 790 (1994).

By December of 2000, when the regulation at issue herein was promulgated, respondent's interpretation of the statutory transition rule of TRA 1986 section 1433(b)(2)(A) had been rejected by the Court of Appeals for the Eighth Circuit in *Simpson v. United States*, 183 F.3d 812 (8th Cir. 1999). However, in light of the above four Federal court opinions that had adopted respondent's statutory interpretation, it is an overstatement and simply not correct to suggest that the Secretary's regulation bootstrapped a failed litigating position.

With the responsibility for tax administration and with the authority and responsibility under section 7805(a) to provide rules and regulations relating to our Federal tax laws, what are the Secretary and respondent supposed to do? When the Federal courts disagree as to the proper interpretation of tax law, is the regulatory authority placed on hold? Must the public and the tax administrator await an ultimate resolution of the issue by the courts? What if the Federal courts remain in conflict, without an ultimate resolution of an issue? Is the tax law, in such a situation, to be interpreted differently in different judicial districts? Are taxpayers to be treated differently?[1]

The Supreme Court recently addressed these concerns in *Natl. Cable & Telecomm. Association v. Brand X Internet Servs.*, 545 U.S. 967, 125 S. Ct. 2688 (2005). Therein, the Supreme Court made it clear that the regulatory authority of Federal agencies remains viable and in play even in the face of pending litigation and decided court cases. The Supreme Court explained:

> Yet allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute * * * would allow a court's interpretation to override an agency's. *Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps. * * * Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for

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[1] Court conflicts over the proper interpretation of statutory language provide perhaps the best evidence that the statutory language subject to the conflicting interpretations is ambiguous.

> the agency to fill, displaces a conflicting agency construction.
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> * * * * * * *
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> Yet whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur. The Court of Appeals' rule [holding that stare decisis required a court to apply a judicial construction rather than a previously existing agency construction], moreover, would "lead to the ossification of large portions of our statutory law," by precluding agencies from revising unwise judicial constructions of ambiguous statutes. Neither *Chevron* nor the doctrine of stare decisis requires these haphazard results. [*Id.* at, __, 125 S. Ct. at 2701-2702; citation omitted.]

For the reasons stated, I respectfully concur.

WELLS and HOLMES, *JJ.*, agree with this concurring opinion.

THORNTON, *J.*, concurring: Under the subject transitional rule, a generation-skipping transfer escapes the effects of the 1986 amendments to the generation-skipping transfer (GST) tax if it is a "generation-skipping transfer under a trust which was irrevocable on September 25, 1985". See Tax Reform Act of 1986, Pub. L. 99-514, sec. 1433(b)(2)(A), 100 Stat. 2731. This language has been interpreted as referring: (1) Narrowly to a generation-skipping transfer that is pursuant to the terms of the trust agreement; and (2) more broadly, to any generation-skipping transfer that is made possible under the terms of the trust agreement, for instance, through the exercise of a general power of appointment pursuant to the trust agreement. The disputed regulations and the majority opinion endorse the first reading. Two Courts of Appeals have endorsed the second reading. *Bachler v. United States*, 281 F.3d 1078 (9th Cir. 2002); *Simpson v. United States*, 183 F.3d 812 (8th Cir. 1999). For the reasons discussed below, I believe the disputed regulations and the majority report are correct.

The "cardinal rule" of statutory construction requires us "to give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (internal quotations omitted). In parsing the transitional rule, *Bachler* and *Simpson* went astray by failing to give effect to the modifying language "generation-skipping" that immediately precedes "transfer under a trust". In *Simpson*, for instance, the appeals court reasoned that because the exercise of a general power of appointment was made possible by the trust, and the transfer was "under" the trust, the generation-skipping transfer effected by the power's exercise qualified under the transitional rule. *Simpson v.*

United States, supra at 814; accord *Bachler v. United States, supra*. Under this construction, however, the modifying language "generation-skipping" has no significant effect. Inasmuch as neither the GST tax nor the transitional rule has any application to any type of transfer other than a generation-skipping transfer, the modifying language "generation-skipping" is unnecessary and superfluous if it serves merely to label the type of transfer eligible for transitional relief. Yet, under the reading adopted by *Simpson* and *Bachler*, the language appears to serve no other function.

To have significant purpose and effect, the modifying language "generation-skipping" is properly construed, I believe, as limiting transitional relief to a generation-skipping transfer that is pursuant to the terms of the trust agreement; i.e., to a transfer that is, just as the statute says, "a generation-skipping transfer under a trust". A generation-skipping transfer that results from the power holder's exercise of a general power of appointment under a trust agreement is not a "generation-skipping transfer under a trust" within the meaning of the transitional rule. Because this conclusion, based partly on the arcana of the GST tax, may not be immediately obvious, some background is in order.

The GST tax applies to three forms of transfers (direct skips, taxable terminations, and taxable distributions) for the benefit of a "skip person", defined generally as a person at least two generations younger than the "transferor". Secs. 2611(a), 2613. See generally Bittker & Lokken, Federal Taxation of Income, Estates & Gifts, par. 133.2.1, at s133-2 (Supp. 2006). For purposes of the GST tax, the "transferor" is the individual "with respect to whom

property was most recently subject to Federal estate or gift tax." Sec. 26.2652-1(a)(1), GST Tax Regs. Pursuant to section 2652(a)(1), "An individual shall be treated as transferring any property with respect to which such individual is the transferor." Thus, a generation-skipping transfer that is effected through a trust arrangement does not necessarily occur upon the creation of the trust. Rather, the generation-skipping transfer occurs when the property passing to the skip person becomes subject to Federal estate or gift tax with respect to the transferor.

In the case of property subject to the Federal estate tax, the "transferor" is the decedent. Sec. 2652(a)(1). Regardless of who the initial "transferor" of property might have been, if the property is subsequently included in the gross estate of another person, that person is substituted for the "transferor". See Bittker & Lokken, *supra* par. 133.2.2. Under section 2041, if a decedent holds a general power of appointment, the property subject to the power is included in the decedent's gross estate. Consequently, for GST tax purposes the holder of such a power is the transferor of the property.[1] See *Peterson Marital Trust v. Commissioner*, 102 T.C. 790, 794, 805 (1994), affd. 78 F.3d 795 (2d Cir. 1996).

In the instant case, the appointive property under Mrs. Gerson's general power of appointment was

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[1] By contrast, if a decedent holds a nongeneral power of appointment (i.e., a limited or special power of appointment), the appointive property is not taxable under sec. 2041. See Bittker & Lokken, Federal Taxation of Income, Estates & Gifts, par. 128.1, at 128-5 (2d ed. 1993). Consequently, in the case of property passing pursuant to a nongeneral power of appointment, the power holder would not be the "transferor" for purposes of the GST tax.

includable in her gross estate pursuant to section 2041. Consequently, for GST tax purposes, she was the "transferor" of this property. Under section 2652(a), she (and not the grantor of the trust, Mr. Gerson) is treated as transferring this property.[2] Thus, notwithstanding that Mrs. Gerson's power of appointment arose under the trust or might be said to have been exercised "under" the trust, the resulting generation-skipping transfer is treated as being directly from her to her grandchildren. Consequently, it was not a "generation-skipping transfer under a trust" within the meaning of the transitional rule.

Sound policy considerations support this result. For Federal estate tax purposes, a general power of appointment is tantamount to outright ownership of the property to which the power relates. See *Morgan v. Commissioner*, 309 U.S. 78, 81 (1940); *Estate of Kurz v. Commissioner*, 101 T.C. 44, 50-51 (1993).[3] Because the holder of a general power of appointment has "effective control over the disposition of the

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[2] Consistent with this view, there appears to be no dispute that the relevant generation-skipping transfer is the "direct skip" from Mrs. Gerson to her grandchildren, rather than any "taxable distribution" from the trust. As the majority opinion states, majority op. p. 6, "The parties do not dispute that a transfer from decedent [Mrs. Gerson] directly to her grandchildren, skipping over decedent's children, normally would be subject to GST."

[3] In this regard, the Federal estate tax rules depart from the traditional common law view, under which the donee was often likened to an agent or trustee for the donor. Under the common-law "relation-back theory", the appointive property was generally thought of as passing directly from the donor to the appointee or the takers in default. See Bittker & Lokken, Federal Taxation of Income, Estates & Gifts, par. 128.1, at 128-3 (2d ed. 1993).

property", the power holder has the ability to avoid a generation-skipping transfer. *Peterson Marital Trust v. Commissioner, supra* at 800. Consequently, the power holder has no legitimate expectation of immunity from the 1986 GST tax amendments that might otherwise apply to generation-skipping transfers resulting from exercise of the power. The purpose of the transitional rule would not be served by providing transitional relief in these circumstances.

The disputed regulations are consistent with *Peterson Marital Trust v. Commissioner, supra*, and provide like results for generation-skipping transfers arising from the exercise of general powers of appointment and generation-skipping transfers arising from lapses of general powers of appointment. This result properly recognizes that there is no substantive difference between these types of generation-skipping transfers.

As memorialized by the Staff of the Joint Committee on Taxation in the General Explanation of the Tax Reform Act of 1986 (J. Comm. Print 1987) (the General Explanation), contemporaneous Congressional colloquies indicate that the principal architects of the transitional rule understood it to apply to the exercise of a *limited* power of appointment under an otherwise grandfathered trust, provided that the exercise of the limited power did not unduly extend the time for the vesting of any beneficial interest in the trust.[4] From these statements, one may draw two

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[4] The General Explanation states:

> The new generation-skipping transfer tax does not apply to the exercise of a limited power of appointment under an otherwise grandfathered trust or to trusts to which the trust property is appointed provided such exercise cannot postpone vesting of any estate or interest in the trust

negative inferences: First, that the transitional rule was not meant to apply to a limited power of appointment that ran afoul of the vesting requirements; and second, and of more relevance here, that the transitional rule was not meant to apply to the exercise of a *general* power of appointment under an otherwise grandfathered trust.

In short, giving effect to all its terms and considering its origin and purpose, the transitional rule has a meaning sufficiently plain as to erase any doubt as to the validity of the disputed regulations.[5]

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property for a period ascertainable without regard to the date of the creation of the trust. [Staff of Jt. Comm. on Taxation, General Explanation of the Tax Reform Act of 1986, at 1267 n.12 (J. Comm. Print 1987).]

As authority for this statement, the General Explanation cites substantively identical colloquies involving the Chairman and Ranking Member of the Senate Committee on Finance and the Chairman of the House Committee on Ways and Means. See 132 Cong. Rec. S13952 (daily ed. Sept. 26, 1986) (colloquy between Senate Committee on Finance Chairman Packwood and the ranking Member Sen. Bentsen); 132 Cong. Rec. H8362 (daily ed. Sept. 25, 1986) (colloquy between House Committee on Ways and Means Chairman Rostenkowski and House Committee on Ways and Means Member Rep. Andrews).

[5] I agree with the conclusion, see majority op. p. 22, that the Supreme Court's statement in *Natl. Cable & Telecomm. Association v. Brand X Internet Servs.*, 545 U.S. 967 (2005), regarding the circumstances in which a "prior judicial construction" might trump an "agency construction otherwise entitled to *Chevron* deference", does not compel us to hold that the disputed regulations are invalid in the wake of *Simpson v. United States*, 183 F.3d 812 (8th Cir. 1999), or *Bachler v. United States*, 281 F.3d 1078 (2002). Under the rule of *Golsen v. Commissioner*, 54 T.C. 742, 757 (1970), affd. 445 F.2d 985 (10th Cir. 1971), this Court is not required to follow *Simpson* and *Bachler* in this case, which is not appealable to either of the circuits in which those

Insofar as the statute might be thought to be ambiguous, to that extent it might be said to have left room for the Secretary to exercise his discretion in promulgating the disputed regulations, which for the reasons discussed above are based on a "permissible construction of the statute". *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

COHEN, SWIFT, WELLS, MARVEL, GOEKE, KROUPA, and HOLMES, *JJ.*, agree with this concurring opinion.

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cases arose. In any event, *Simpson* and *Bachler* did not address the validity of the disputed regulations.

HOLMES, *J.*, concurring: The issue before the court is simply this—is the regulation a reasonable interpretation of the statute? I concur with the result that the majority reaches and with their analysis of the disputed regulation's validity under *National Muffler*.[1]

I write separately because the Sixth Circuit—the circuit to which any appeal of this case is headed—has expressly adopted *Chevron*[2] deference for tax regulations, like the one here, that are issued under section 7805's general authority.[3] In *Swallows*,[4] the Court aired its differences on deference under *National Muffler* versus deference under Chevron. Swallows is now on appeal, but I recognize that the majority is constrained to use *National Muffler* review unless there would be a practical certainty of reversal. See *Golsen v. Commissioner*, 54 T.C. 742, 757 (1970), affd. 445 F.2d 985 (10th Cir. 1971). That practical certainty isn't present here because, as is usually the case, whether a regulation is valid doesn't depend on the standard: the top-to-bottom review we have found required by *National Muffler* and the two-part test of *Chevron* will usually lead to the same result.[5]

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[1] *Natl. Muffler Dealers Assn. v. United States*, 440 U.S. 472 (1979).

[2] *Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[3] See *Hosp. Corp. of Am. & Subs. v. Commissioner*, 107 T.C. 73 (1996), affd. 348 F.3d 136, 140-141 (6th Cir. 2003); *Peoples Fed. Sav. & Loan Assn. v. Commissioner*, T.C. Memo. 1990-129, revd. 948 F.2d 289, 299-300 (6th Cir. 1991).

[4] *Swallows Holding, Ltd. v. Commissioner*, 126 T.C. 96, on appeal (3d Cir., filed July 5, 2006).

[5] See *Swallows*, 126 T.C. at 173-174 (Holmes, J., dissenting).

Under both these standards, we start by deciding whether the words of section 1433(b)(2)(A) have a plain meaning. As the Supreme Court described step one of the analysis in *Chevron*, "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. As I noted in *Swallows*, 126 T.C. at 164 n.7 (Holmes, J., dissenting), there is a controversy over whether courts should only look to the text and structure of the statute in deciding whether a statute is ambiguous, *Natl. R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417 (1992) (citations omitted), or whether they should also investigate the legislative history in this first step, *Chevron*, 467 U.S. at 842-843.[6] However, that controversy isn't relevant to this case: The majority opinion and the carefully drawn concurrences of Judges Swift and Thornton show the ambiguity of the phrase "generation-skipping transfer under a trust," and Judge Thornton's shows as well that the legislative history—such as it is—reveals that the overall purpose of the transition provision was to ratify only unavoidable generation-skipping transfers.

There is not, then, an "unambiguously expressed intent" to the contrary. I readily admit that the dissent's construction, following *Bachler* and *Simpson*, is reasonable too. But, as the Sixth Circuit noted in *Peoples Federal S&L*, "there may be several permissible constructions. If there are gaps left by silence or ambiguity of the statutes in question,

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[6] The Sixth Circuit *does* look at legislative history in step one. See *Hospital Corp.*, 348 F.3d at 143; *Peoples Federal S&L*, 948 F.2d at 299.

agencies may fill the gaps with necessary rules, providing they are reasonable, and courts should not interfere with this process." 948 F.2d at 300.

And reasonableness is all that's required in step two of *Chevron*. In gift and estate tax law, the IRS has for years consistently treated a general power of appointment as equivalent to ownership. See *Estate of Kurz v. Commissioner*, 101 T.C. 44 (1993), supplemented and reconsideration denied T.C. Memo. 1994-221, affd. 68 F.3d 1027 (7th Cir. 1995). Because the holder of a general power controls the ultimate disposition of trust property, that property is includable in the gross estate for estate tax purposes, section 2041, and the transfer of property by the exercise or release of the power is deemed a transfer by the person in possession of the power, section 2514(b). In *Peterson*,[7] moreover, the Second Circuit agreed with us (even in the absence of the regulation at issue today) that it was reasonable to regard the lapse of a general power as a constructive addition to the trust that created it. It is just as reasonable to treat all generation-skipping uses—whether a lapse or transfer or some other exercise—of a general power alike. Doing so eliminates the distinctions created in *Simpson* and *Bachler* between the taxability of a general power's exercise, and the taxability of its lapse. It also conforms the transition provision to a commonsense reading of section 1433(b)(2)(A) as protecting generation-skipping transfers only where the tax could not have otherwise been avoided.

Is section 26.2601-1(b)(1)(i), GST Tax Regs., the best interpretation of the statute? That isn't for us to

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[7] *Peterson Marital Trust v. Commissioner*, 102 T.C. 790 (1994), affd. 78 F.3d 795 (2d Cir. 1996).

decide. Our task is simply to determine if the regulation is a reasonable interpretation of the exemption's applicability to the holder of a general power under an irrevocable generation-skipping trust. This regulation is.

SWIFT, *J.*, agrees with this concurring opinion.

LARO, *J.*, dissenting: The Court's opinion concludes *supra* p. 29 that respondent's interpretation of section 1433(b)(2)(A) of the Tax Reform Act of 1986 (TRA 1986), Pub. L. 99-514, 100 Stat. 2731, "is a reasonable and valid interpretation of the plain language of TRA 1986 section 1433(b)(2)(A)". Because I disagree, I dissent.[1] As the Courts of Appeals for the Eighth and Ninth Circuits held in *Simpson v. United States*, 183 F.3d 812 (8th Cir. 1999), and *Bachler v. United States*, 281 F.3d 1078 (9th Cir. 2002), factual settings that the Court's opinion *supra* pp. 15 and 17 acknowledges are "nearly identical" to the factual setting at hand, the plain reading of TRA 1986 section 1433(b)(2)(A) leads to a conclusion contrary to that expressed in the Court's opinion. The conclusion in the Court's opinion is predicated on its finding that

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[1] Following a prior judicial decision rejecting respondent's interpretation of TRA 1986 sec. 1433(b)(2)(A) as inconsistent with the plain reading of that section, respondent caused his interpretation to be prescribed in sec. 26.2601-1(b)(1)(i), GST Tax Regs. The Court's opinion *supra* p. 21 frames this case as "a question of first impression concerning the validity of section 26.2601-1(b)(1)(i), GST Tax Regs." I view this case differently. In a case such as this, where the question involves an "interpretation of the plain language" of a statute, respondent's interpretation of that language is not entitled to any greater respect simply because respondent has bootstrapped his interpretation by causing it to be prescribed in a regulation. The judiciary, and not respondent (or the Secretary), is the final authority on the plain meaning of a statute. See *Rubin v. United States*, 449 U.S. 424, 430 (1981); *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). While *Natl. Cable & Telecomm. Association v. Brand X Internet Servs.*, 545 U.S. 967 (2005), allows an agency in certain cases to overrule an adverse judicial interpretation through the issuance of regulations, that case is inapplicable where, as here, the judicial interpretation follows from the unambiguous terms of the statute.

respondent's interpretation is "a reasonable * * * interpretation of the plain language" of TRA 1986 section 1433(b)(2)(A), as opposed to a finding, which the Court's opinion does not make, that respondent's interpretation represents *the* plain reading of TRA 1986 section 1433(b)(2)(A). To my mind, an unambiguous statute has only a single plain reading, see *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001), and any other reading is ultra vires even if it is "reasonable".[2] Such is especially so where, as here,

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[2] I disagree with the Court's opinion's conclusion *supra* pp. 24-25 that "Congress has [not] directly spoken to the precise question at issue" "Inasmuch as TRA 1986 section 1433(b)(2)(A) does not define the phrase 'transfer under a trust'". Congress has spoken directly on this issue in the best way that it can; i.e., by providing in unambiguous terms that the generation-skipping tax (GST) "*shall not apply to* * * * *any* generation-skipping transfer under a trust which was irrevocable on September 25, 1985". TRA 1986 sec. 1433(b)(2)(A) (emphasis added); see *HUD v. Rucker*, 535 U.S. 125, 131 (2002) ("As we have explained, 'the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind"' (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997))); *United States v. Am. Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."); see also *United States v. Monsanto*, 491 U.S. 600, 606-609 (1989); *D.J. Lee, M.D., Inc. v. Commissioner*, 931 F.2d 418, 420 (6th Cir. 1991), affg. 92 T.C. 291 (1989); *Cornett-Lewis Coal Co. v. Commissioner*, 141 F.2d 1000, 1004 (6th Cir. 1944), revg. and remanding 47 B.T.A. 571 (1942). I know no rule of law, nor has the Court's opinion referenced any such rule, that states that a term is ambiguous simply because it is not defined by Congress. The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. * * * When the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it

respondent's interpretation was previously rejected by a judicial tribunal in favor of the plain reading application of that section.

TRA 1986 section 1433(b)(2)(A) provides in relevant part that the GST does not apply to "any generation-skipping transfer under a trust which was irrevocable on September 25, 1985, but only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985".[3] As noted in the Court's opinion *supra* pp. 7 and 17-18, the Secretary proposed section 26.2601-1(b)(1)(i), GST Tax Regs., in 1999, 13 years after the enactment of TRA 1986 section 1433(b)(2)(A), to supplant the literal interpretation that the Secretary had given TRA 1986 section 1433(b)(2)(A) in a predecessor regulation and, more particularly, to overrule the judiciary's rejection in *Simpson v. United States, supra*, of respondent's more restrictive interpretation of TRA 1986 section 1433(b)(2)(A). As finalized, section 26.2601-1(b)(1)(i), GST Tax Regs., states in relevant part:

> The provisions of chapter 13 do not apply to any generation-skipping transfer under a trust (as defined in section 2652(b)) that was irrevocable

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according to its terms." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. ___, 126 S.Ct. 2455, 2459 (2006) (citations and internal quotation marks omitted).

[3] As I read TRA 1986 sec. 1433(b)(2)(A), Congress included within that section both a general rule and an exception thereto. The general rule provides that the GST does not apply to "any generation-skipping transfer under a trust which was irrevocable on September 25, 1985". The exception provides that the general rule applies "only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985".

> on September 25, 1985. * * * Further, the rule in the first sentence of this paragraph (b)(1)(i) does not apply to a transfer of property pursuant to the exercise, release, or lapse of a general power of appointment that is treated as a taxable transfer under chapter 11 or chapter 12. The transfer is made by the person holding the power at the time the exercise, release, or lapse of the power becomes effective, and is not considered a transfer under a trust that was irrevocable on September 25, 1985. * * *

Petitioner's appeal of the Court's opinion's acceptance of respondent's nonliteral interpretation of TRA 1986 section 1433(b)(2)(A) will most certainly be to the Court of Appeals for the Sixth Circuit. That court has advised lower courts that "Where the statute is clear, the agency has nothing to interpret and the court has no agency interpretation to which it may be required to defer." *Dixie Fuel Co. v. Commr. of Soc. Sec.*, 171 F.3d 1052, 1064 (6th Cir. 1999), abrogated on other grounds by *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003); accord *Bradley v. Austin*, 841 F.2d 1288, 1293 (6th Cir. 1988) ("In determining the meaning of legislation, we must first look to the plain language of the statute itself. * * * If we find that the statutory language is unambiguous, then that language is regarded as conclusive unless there is a clearly expressed legislative intent to the contrary"); *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949) (holding that plain and unambiguous text must be applied as written without resort to construction); see also *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed

intent of Congress"). The Courts of Appeals for the Eighth and Ninth Circuits have held in *Simpson v. United States*, 183 F.3d 812 (8th Cir. 1999), and *Bachler v. United States*, 281 F.3d 1078 (2002), that the general rule in TRA 1986 section 1433(b)(2)(A) may be applied plainly as written, and the Court's opinion sets forth no persuasive reason as to why the Court of Appeals for the Sixth Circuit, or any other Court of Appeals for that matter, should (or will) disagree with the holdings of those cases.[4]

The Court's opinion strains to find an ambiguity in the clear reading of TRA 1986 section 1433(b)(2)(A) by referencing *Peterson Marital Trust v. Commissioner*, 102 T.C. 790 (1994), affd. 78 F.3d 795 (2d Cir. 1996). That case is both factually and legally distinguishable from *Simpson v. United States, supra*, and *Bachler v. United States, supra*. First, as a matter of law, *Peterson Marital Trust* did not deal with the part of the statute at issue in *Simpson* and *Bachler* (as well as at issue here). The case of *Peterson Marital Trust* concerned the part of TRA 1986 section 1433(b)(2)(A) that follows the comma;

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[4] The Court's opinion suggests *supra* p. 25 that the Courts of Appeals for the Eighth and Ninth Circuits did not consider the general rule in its "particular context". I disagree. Those courts applied the general rule according to the plain reading of its terms and, consistent with settled law, see, e.g., *Bower v. Fed. Express Corp.*, 96 F.3d 200, 208 (6th Cir. 1996) (holding that an ambiguity in one part of a statute is not cause to narrow or expand the plain meaning of a term found elsewhere in the statute), declined respondent's invitation to narrow the plain reading of those terms on account of a proffered ambiguity in the terms of the statute. When a clear term may be construed plainly as written, a court should not strain to find ambiguity in that term so as apply it differently. See *Sphinx Intl., Inc. v. Natl. Union Fire Ins. Co.*, 412 F.3d 1224, 1228 (11th Cir. 2005).

i.e., the exception that provides "only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985". The Courts of Appeals for the Eighth and Ninth Circuits construed the part of TRA 1986 section 1433(b)(2)(A) preceding the comma; i.e., the general rule that provides "any generation-skipping transfer under a trust which was irrevocable on September 25, 1985". The Courts of Appeals for the Eighth and Ninth Circuits held specifically that the exercise of a general testamentary power of appointment by a beneficiary of a decedent's trust is within the "clear" or "straightforward" plain reading of the general rule because the exercise is a transfer under a trust which was irrevocable on September 25, 1985. *Bachler v. United States, supra* at 1079, 1080 (the court reached its decision by applying a "straightforward reading" of the general rule); *Simpson v. United States, supra* at 813, 814, 816 (the court held that the reading of the general rule is "clear"); accord *Bartlik v. U.S. Dept. of Labor*, 62 F.3d 163, 165-166 (6th Cir. 1995) (courts must endeavor to apply the plain meaning of a statute as ascertained through a "straightforward" and "commonsense" approach). The Courts of Appeals for the Eighth and Ninth Circuits rejected respondent's reading of the general rule to require that the transfer be irrevocable on September 25, 1986, a reading also espoused by respondent here and accepted by the Court's opinion *supra* pp. 21 and 27-29, concluding instead that the general rule in TRA 1986 section 1433(b)(2)(A) plainly required that the trust be irrevocable on that date. See *Bachler v. United States, supra* at 1080; *Simpson v. United States, supra* at 814. That conclusion is supported by the "rule of the last antecedent", under which the clause "which was irrevocable on September 25,

1985" should be construed to relate to the word "trust" and not to the word "transfer". See 2A Singer, Sutherland Statutory Construction, sec. 47:33 (6th ed. 2000); see also *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). That conclusion also is supported by the fact that Congress apparently drafted the general rule with a broad and precise brush, providing explicitly that the GST "*shall not apply to* * * * *any* generation-skipping transfer under a trust which was irrevocable on September 25, 1985." (Emphasis added.) Accord *Dixie Fuel Co. v. Commr. of Soc. Sec.*, *supra* at 1061 (noting that the "Supreme Court has held in any number of contexts that 'shall' is 'explicitly mandatory' language").

The cases of *Simpson v. United States, supra*, and *Bachler v. United States, supra*, also are factually distinguishable from the case of *Peterson Marital Trust v. Commissioner, supra*. The cases of *Simpson* and *Bachler*, like the present case, involved the exercise of a power of appointment and the question of whether the exercise was a transfer under a trust; the case of *Peterson Marital Trust* involved the lapse of a power of appointment and the question of whether the lapse added corpus to the trust. As the Courts of Appeals noted in *Simpson v. United States, supra* at 815-816, and *Bachler v. United States, supra* at 1080, this critical point sufficiently distinguished those two cases from *Peterson Marital Trust* and the holding thereof. See also *Simpson v. United States, supra* at 815 ("The distinction between *Peterson* and the present case is obvious."). The courts also noted that the lapse in *Peterson Marital Trust* was governed by a temporary regulation that stated what constituted "corpus added to the trust" and that the exercise of the power of appointment was outside of that regulation in that the exercise depleted, rather

than added, to the trust's corpus. See *Bachler v. United States, supra* at 1080; *Simpson v. United States, supra* at 815-816.

In closing, I believe that the Court in this case should apply the plain and unambiguous reading of the general rule, consistent with the reading of the Courts of Appeals for the Eighth and Ninth Circuits. Because the Court's opinion does not do so, I dissent.

COLVIN, VASQUEZ, GALE, and WHERRY, *JJ.*, agree with this dissenting opinion.

VASQUEZ, *J.*, dissenting: I write separately to address the issue of the proper deference the Court should give to interpretive regulations.[1] I respectfully disagree with the position that when the Court reviews interpretive regulations we should continue to follow the analysis set forth in *Natl. Muffler Dealers Association v. United States*, 440 U.S. 472 (1979). See Court op. pp. 22-23. I believe that in *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Supreme Court of the United States set forth the analysis that courts should use to decide the deference courts should give to interpretive regulations.

I. *Chevron Deference*

"If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). Accordingly, an agency interpretation (e.g., a Treasury regulation) cannot conflict with the unambiguously expressed intent of Congress.

If a statute is ambiguous, *Chevron* provides that a reviewing court is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable. *United States v. Mead Corp., supra* at 227, 229. Thus, any regulation entitled to *Chevron* deference is binding on the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute. *Id.* at 227.

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[1] Deference only sets the framework for judicial analysis; it does not displace it. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982); *United States v. Cartwright*, 411 U.S. 546, 550 (1973).

II. *Mead*

It is "plain error for [courts] to rely on" *Chevron* in determining what deference to give agency actions without considering *Mead. Am. Fedn. of Govt. Employees, AFL-CIO v. Veneman*, 284 F.3d 125, 129 (D.C. Cir. 2002).

In *Mead*, the Supreme Court clarified the limits of *Chevron* deference owed to an agency's interpretation of a statute it administers. The Supreme Court held that an agency's interpretation of a particular statutory provision qualifies for *Chevron* deference when (1) Congress delegated authority to the agency to make rules or regulations carrying the force of law, and (2) the agency interpretation claiming deference was promulgated in the exercise of that authority. *United States v. Mead Corp., supra* at 226-227, 237; *Pool Co. v. Cooper*, 274 F.3d 173, 177 n.3 (5th Cir. 2001). Furthermore, "mere ambiguity in a statute is not evidence of congressional delegation of authority", agency authority is not to be lightly presumed, and courts should not presume a delegation of power based solely on the fact that there was not an express withholding of such power. *Michigan v. EPA*, 268 F.3d 1075, 1082 & n.2 (D.C. Cir. 2001).

When an agency's interpretation of a particular statutory provision does not qualify for *Chevron* deference, it is entitled to the deference accorded under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *United States v. Mead Corp., supra* at 234-235, 237. Pursuant to *Skidmore*, the agency's interpretation is accorded respect proportional to its "power to persuade". *Id.* at 235; *Pool Co. v. Cooper, supra* at 177 (in the absence of *Chevron* deference, pursuant to *Mead* the agency's interpretation is accorded respect under *Skidmore* according to its "power to per-

suade"); *Landmark Legal Found. v. IRS*, 267 F.3d 1132, 1135-1136 (D.C. Cir. 2001) (when *Chevron* deference does not apply, the Internal Revenue Service's interpretations are entitled to "no more than the weight derived from their 'power to persuade.'").

III. *Interpretive Versus Legislative Regulations*

Treasury regulations are either legislative or interpretive in character. *Tutor-Saliba Corp. v. Commissioner*, 115 T.C. 1, 7 (2000). Interpretive regulations are promulgated under section 7805; legislative regulations, however, are issued pursuant to a specific Congressional delegation of authority, to the Secretary of the Treasury or the Commissioner, to issue rules or regulations that have the force and effect of law. *Id.; Hefti v. Commissioner*, 97 T.C. 180, 189 (1991), affd. 983 F.2d 868 (8th Cir. 1993). "An interpretive regulation may be contrasted to a legislative regulation, one which is mandated specifically in the statute and has the force and effect of law." *Matheson v. Commissioner*, 74 T.C. 836, 840 n.7 (1980).

The Internal Revenue Code contains numerous specific delegations of authority from Congress to the Secretary or the Commissioner to issue rules or regulations that have the force and effect of law. See, e.g., sec. 1502. These sections--that provide for issuing legislative regulations--would be superfluous if section 7805 were a delegation of authority from Congress to make rules or regulations carrying the force of law. It is a fundamental rule of statutory construction to give effect to all of the language of the statute. See *Hellmich v. Hellman*, 276 U.S. 233 (1928); *Stanford v. Commissioner*, 297 F.2d 298, 308 (9th Cir. 1961), affg. 34 T.C. 1150 (1960); *Larkin v. United States*, 78 F.2d 951 (8th Cir. 1935); *Stolk v.*

Commissioner, 40 T.C. 345 (1963), affd. per curiam 326 F.2d 760 (2d Cir. 1964). It is a well-accepted rule of statutory construction that the various sections of the Code should be construed so that one section will explain and support and not defeat or destroy another section. *Crane v. Commissioner*, 331 U.S. 1, 13 (1947); *Bernier v. Bernier*, 147 U.S. 242, 246 (1893); *Pleasanton Gravel Co. v. Commissioner*, 85 T.C. 839, 851 (1985). Accordingly, I believe that section 7805 is not a delegation of authority by Congress to make rules or regulations carrying the force of law.

IV. *Mead Applied to Interpretive Regulations*

Prior to *Mead*, we questioned whether *Chevron* applies to interpretive regulations. *Cent. Pa. Sav. Association & Subs. v. Commissioner*, 104 T.C. 384, 391 (1995) (citing *E.I. duPont de Nemours & Co. v. Commissioner*, 41 F.3d 130 (3d Cir. 1994), affg. 102 T.C. 1 (1994)). The Supreme Court, also prior to issuing *Mead*, held that interpretive regulations are owed "less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision". *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981); see *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982) (quoting *Rowan Cos.*); see also *Cent. Pa. Sav. Association v. Commissioner, supra* at 391 (citing *Vogel Fertilizer Co.*). Accordingly, what level of deference the Court should give to interpretive regulations needs to be reexamined in light of *Mead*.

The first question in the *Mead* analysis is whether Congress delegated authority to the agency to make rules or regulations carrying the force and effect of law. *United States v. Mead Corp.*, 533 U.S. at 226-

227; *Pool Co. v. Cooper, supra* at 177 n.3. The second question is whether the agency invoked that authority. *United States v. Mead Corp., supra; Pool Co. v. Cooper, supra.*

By promulgating a regulation pursuant to section 7805, the regulation was not issued pursuant to a delegation of authority by Congress to make rules or regulations carrying the force and effect of law. See *Tutor-Saliba Corp. v. Commissioner, supra* at 7; *Matheson v. Commissioner, supra* at 840 n.7. Accordingly, pursuant to *Mead*, interpretive regulations are not entitled to *Chevron* deference; instead, they are entitled to *Skidmore* deference. *United States v. Mead Corp., supra* at 234-235; *Rowan Cos. v. United States, supra* at 253; *United States v. Vogel Fertilizer Co., supra* at 24; *Pool Co. v. Cooper, supra* at 177; *Cent. Pa. Sav. Association v. Commissioner, supra* at 391; *Klamath Strategic Inv. Fund, LLC v. United States*, 440 F. Supp. 2d 608, 621 (E.D. Tex. 2006) (discussing the differences between legislative and interpretive regulations, concluding that different standards of review apply to each and that courts must accord a higher degree of deference to a legislative regulation than to an interpretive regulation, and holding that "*Chevron* deference is only available to the Regulation if it is a legislative regulation."); see also *Boeing Co. v. United States*, 537 U.S. 437, 448 (2003) (noting that an interpretive regulation promulgated under section 7805 "rather than pursuant to a specific grant of authority" is entitled to some measure of deference; however, the Court did not hold or suggest that interpretive regulations should receive *Chevron* deference).

V. *Conclusion*

I believe that *Mead* changed the landscape regarding the deference courts should give to interpretive regulations. Pursuant to the analysis set forth by the Supreme Court in *Mead*, I believe interpretive regulations are entitled to *Skidmore* deference.

Accordingly, I dissent.

APPENDIX C

§ 1433. Effective dates.

(a) General Rule.—Except as provided in subsection (b), the amendments made by this part shall apply to any generation-skipping transfer (within the meaning of section 2611 of the Internal Revenue Code of 1986) made after the date of the enactment of this Act.

(b) Special Rules.—

(1) Treatment Of Certain Inter Vivos Transfers Made After September 25, 1985—For purposes of subsection (a) (and chapter 13 of the Internal Revenue Code of 1986 as amended by this part), any inter vivos transfer after September 25, 1985, and on or before the date of the enactment of this Act shall be treated as if it were made on the 1st day after the date of enactment of this Act.

(2) Exceptions.—The amendments made by this part shall not apply to—

(A) any generation-skipping transfer under a trust which was irrevocable on September 25, 1985, but only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985,

(B) any generation-skipping transfer under a will executed before the date of the enactment of this Act if the decedent dies before January 1, 1987, and

(C) any generation-skipping transfer—

(i) under a trust to the extent such trust consists of property included in the gross

estate of a decedent (other than property transferred by the decedent during his life after the date of the enactment of this Act), or reinvestments thereof, or

(ii) which is a direct skip which occurs by reason of the death of any decedent; but only if such decedent was, on the date of the enactment of this Act, under a mental disability to change the disposition of his property and did not regain his competence to dispose of such property before the date of his death

(3) Treatment Of Certain Transfers To Grandchildren.—For purposes of chapter 13 of the Internal Revenue Code of 1986, the term "direct skip" shall not include any transfer before January 1, 1990, from a transferor to a grandchild of the transferor to the extent that the aggregate transfers from such transferor to such grandchild do not exceed $2,000,000.

(c) Repeal Of Existing Tax On Generation-Skipping Transfers.

(1) In General—In the case of any tax imposed by chapter 13 of the Internal Revenue Code of 1954 (as in effect on the day before the date of the enactment of this Act), such tax (including interest, additions to tax, and additional amounts) shall not be assessed and if assessed, the assessment shall be abated, and if collected, shall be credited or refunded (with interest) as an overpayment.

(2) Waiver Of Statute Of Limitations.—If on the date of the enactment of this Act (or at any time within 1 year after such date of enactment)

refund or credit of any, overpayment of tax resulting from the application of paragraph (1) is barred by any law or rule of law, refund or credit of such overpayment shall, nevertheless, be made or allowed if claim therefore is filed before the date 1 year after the date of the enactment of this Act.

(d) Election For Certain Transfers Benefiting Grandchild—

(1) In General—For purposes of chapter 13 of the Internal Revenue Code of 1986 (as amended by this Act) and subsection (b) of this section, any transfer in trust for the benefit of a grandchild of a transferor shall be treated as a direct skip if—

(A) the transfer occurs before the date of enactment of this Act,

(B) the transfer would be a direct skip except for the fact that the trust instrument provides that, if the grandchild dies before vesting of the interest transferred, the interest is transferred to the grandchild's heir (rather than the grandchild's estate), and

(C) an election under this subsection applies to such transfer.

Any transfer treated as a direct skip by reason of the preceding sentence shall be subject to Federal estate tax on the grandchild's death in the same manner as if the contingent gift over had been to the grandchild's estate.

(2) Election—An election under paragraph (1) shall be made at such time and in such manner as the Secretary of the Treasury or his delegate may prescribe.

§ 26.2601-1 Effective dates.

* * * *

(b) Exceptions—(1) Irrevocable trusts—(i) *In general.* The provisions of chapter 13 do not apply to any generation-skipping transfer under a trust (as defined in section 2652(b)) that was irrevocable on September 25, 1985. The rule of the preceding sentence does not apply to a pro rata portion of any generation-skipping transfer under an irrevocable trust if additions are made to the trust after September 25, 1985. See paragraph (b)(1)(iv) of this section for rules for determining the portion of the trust that is subject to the provisions of chapter 13. Further, the rule in the first sentence of this paragraph (b)(1)(i) does not apply to a transfer of property pursuant to the exercise, release, or lapse of a general power of appointment that is treated as a taxable transfer under chapter 11 or chapter 12. The transfer is made by the person holding the power at the time the exercise, release, or lapse of the power becomes effective, and is not considered a transfer under a trust that was irrevocable on September 25, 1985. See paragraph (b)(1)(v)(B) of this section regarding the treatment of the release, exercise, or lapse of a power of appointment that will result in a constructive addition to a trust. See §28.2652-1(a) for the definition of a transferor.

* * * *

Apr.21 08

No. 07-1064

In the Supreme Court of the United States

ALLAN D. KLEINMAN, EXECUTOR OF THE ESTATE OF ELEANOR R. GERSON, DECEASED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

NATHAN J. HOCHMAN
Assistant Attorney General

RICHARD FARBER
KAREN G. GREGORY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether 26 C.F.R. 26.2601-1(b)(1)(i), which provides that certain generation-skipping transfers effected by the exercise of general powers of appointment are taxable, constitutes a valid exercise of the Department of the Treasury's rulemaking authority.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 507 F.3d 435. The opinion of the Tax Court (Pet. App. 13a-72a) is reported at 127 T.C. 139.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2007. The petition for a writ of certiorari was filed on February 7, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. As part of its overhaul of the tax laws in 1986, Congress enacted statutory provisions that impose a generation-skipping transfer (GST) tax on transfers of property to persons who are at least two generations

below the transferor (such as grandchildren). Tax Reform Act of 1986 (Tax Reform Act), Pub. L. No. 99-514, § 1431, 100 Stat. 2717 (26 U.S.C. 2601 *et seq.*). Those provisions were designed "to ensure taxation of generation skipping transfers in a comparable manner to outright transfers from one generation to the next, and to remove the estate planning tool of escaping taxation by skipping a generation in an estate transfer." *Comerica Bank, N.A.* v. *United States*, 93 F.3d 225, 228 (6th Cir. 1996).

The GST tax applies to "every" generation-skipping transfer. 26 U.S.C. 2601. As is relevant here, however, Congress excepted "any generation-skipping transfer under a trust which was irrevocable on September 25, 1985, but only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985." Tax Reform Act § 1433(b)(2), 100 Stat. 2731. The critical issue in this case is whether that statutory exception applies to a transfer made pursuant to a general power of appointment after September 25, 1985, where the general power of appointment was conferred by a trust that had become irrevocable before that date. In 2000, the Department of the Treasury, acting pursuant to a specific grant of rulemaking authority, see 26 U.S.C. 2663, promulgated a final regulation addressing that issue. In relevant part, the regulation provides that, while "[t]he provisions [governing the GST tax] do not apply to any generation-skipping transfer under a trust * * * that was irrevocable on September 25, 1985," that rule "does not apply to a transfer of property pursuant to the exercise, release, or lapse of a general power of appointment that is treated as a taxable transfer under [the statutory provisions governing the estate and gift taxes]." 26 C.F.R. 26.2601-1(b)(1)(i). In such

circumstances, "[t]he transfer is made by the person holding the power at the time the exercise, release, or lapse of the power becomes effective, and is not considered a transfer under a trust that was irrevocable on September 25, 1985." *Ibid.*

2. In 1968, Benjamin Gerson created a trust, which became irrevocable upon his death in 1973. The trust provided for the creation of three separate trusts upon Gerson's death, one of which was a marital trust to benefit Gerson's wife, Eleanor, who is the decedent in this case. The marital trust conferred upon decedent "an unlimited testamentary power of appointment in respect of the whole of [the trust property]." In 1999, decedent established a trust for the benefit of her grandchildren and more remote descendants; in her will, decedent provided that she was exercising her power of appointment conferred by the marital trust and directing that all property subject thereto should be administered pursuant to the terms of the grandchildren's trust. Pet. App. 2a, 14a-16a.

Decedent died in 2000. Upon her death, the property subject to the marital trust was transferred into the grandchildren's trust, pursuant to the terms of her will; petitioner, the executor of decedent's estate, filed a tax return that did not report any GST tax for the transferred property. The Commissioner of Internal Revenue subsequently determined that there was a deficiency in GST tax of over $1.1 million. Pet. App. 2a, 13a, 16a-17a. Petitioner challenged the deficiency in the Tax Court, claiming that the regulation governing transfers made pursuant to general powers of appointment was invalid.

3. The Tax Court ruled against petitioner and upheld the regulation. Pet. App. 13a-72a. Applying this

Court's decisions in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472 (1979) (which set out certain factors to be considered in reviewing the validity of a tax regulation), the Tax Court first determined that Congress had not "directly spoken to the precise question at issue," because "[S]ection 1433(b)(2)(A) does not define the phrase 'transfer under a trust.'" Pet. App. 34a-36a. The court reasoned that "nothing in the committee reports suggests that, when Congress referred to 'transfers under a trust,' it ever contemplated or considered a volitional generation-skipping transfer arising from the exercise of a general power of appointment as opposed to a specific transfer by the settlor to identified persons." *Id.* at 37a.

The Tax Court next observed that the legislative history of the Tax Reform Act reflected Congress's intent that "Federal transfer taxes generally should be applied as uniformly as possible" and "generation-skipping transfers having a similar substantial effect should be taxed in a similar manner." Pet. App. 38a. According to the court, the regulation at issue "harmonizes with the origin and purpose of * * * [S]ection 1433(b)(2)(A) and achieves the consistency and uniformity Congress sought." *Ibid.* The court noted that "the regulation is consistent with the general proposition under the GST tax regime that a decedent who dies holding a general power of appointment over property is treated as the 'transferor' of that property for purposes of GST tax." *Ibid.*

The Tax Court added that "the particular purpose of the statute" was "to protect taxpayers who, on the basis of pre-existing rules, made estate-planning arrange-

ments from which they could not reasonably escape and which would otherwise generate GST tax liability." Pet. App. 39a. The court concluded that "[t]he generation-skipping transfers in the present case are not transfers the transitional rules were intended to protect," because "Mr. Gerson did not structure his irrevocable trust in a manner that tied the hands of his heirs, nor was decedent required to make the disputed generation-skipping transfers." *Ibid.*

Three judges of the Tax Court wrote separate concurring opinions; another concurred only in the result. Pet. App. 40a-58a. Five judges dissented. Judge Laro, joined by four other judges, would have held that the text of Section 1433(b)(2)(A) unambiguously foreclosed the Treasury's interpretation. *Id.* at 59a-66a. Judge Vasquez separately contended that the regulation at issue was entitled only to the lesser degree of deference required by *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). Pet. App. 67a-72a.

4. The court of appeals affirmed. Pet. App. 1a-12a. Like the Tax Court, the court of appeals concluded that "the [Treasury's] regulation reasonably construes an ambiguous statutory provision." *Id.* at 2a. As a preliminary matter, the court of appeals held that the regulation was subject to the *Chevron* framework. *Id.* at 4a-5a. Applying *Chevron*, the court of appeals then determined that the text of Section 1433(b)(2)(A) was ambiguous. *Id.* at 5a-11a. The court noted that petitioner contended that the term "under," in the statutory phrase "transfer under a trust," "merely implies that the trust instrument is the root of the * * * power [to skip generations]," whereas the Treasury contended that, in this case, "the transfer was not under a trust irrevocable before 1985, but under [decedent's] will." *Id.* at 10a.

The court concluded that each of those readings of the text was "plausible." *Id.* at 11a.

The court of appeals noted that two other circuits had held, in cases not covered by the regulation at issue here, that Section 1433(b)(2)(A) applied to transfers effected by the exercise of general powers of appointment. Pet. App. 7a (citing *Simpson* v. *United States*, 183 F.3d 812 (8th Cir. 1999), and *Bachler* v. *United States*, 281 F.3d 1078 (9th Cir. 2002)). But the court of appeals rejected petitioner's contention that, under this Court's decision in *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), it was "require[d] * * * to follow the Eighth Circuit's 'plain language' determination." Pet. App. 9a n.2. The court of appeals explained that the Eighth Circuit had not held that "the statute was so clear that it foreclosed regulation." *Ibid.*

Finally, the court of appeals determined that the regulation constituted a reasonable interpretation of Section 1433(b)(2)(A). Pet. App. 11a-12a. The court noted that a general power of appointment has long been viewed as essentially identical to outright ownership of property for tax purposes. *Id.* at 11a. "Thus," the court reasoned, "the regulation conforms the grandfather clause to other elements of the tax scheme." *Ibid.* The court added that "the other exceptions to the GST tax * * * all represent inescapable contingencies that justify grandfathering," whereas "[petitioner's] proposed interpretation protects disproportionately broad reliance on prior tax laws." *Ibid.* While the court acknowledged that "[t]he parties debate the breadth of reliance the legislature intended to protect," it observed that "the legislature gave no guidance other than its ambiguous words." *Id.* at 12a. The court concluded that

"[t]his is precisely the type of decision entrusted to agency discretion." *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 10-26) that 26 C.F.R. 26.2601-1(b)(1)(i), which provides that certain generation-skipping transfers effected by the exercise of general powers of appointment are taxable, constitutes an invalid exercise of the Treasury's rulemaking authority. The court of appeals' decision upholding the regulation is correct and does not conflict with any decision of this Court or of another court of appeals. Moreover, because the regulation at issue involves the interpretation of a transitional rule that applies only to trusts that became irrevocable more than 20 years ago, this case presents a question of diminishing significance. Further review is not warranted.

1. The court of appeals correctly held that the Treasury's regulation is valid. Under the familiar framework of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the first step of the inquiry is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If the legislative intent is clear, that is the end of the matter, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843. As the court of appeals correctly observed (Pet. App. 10a-11a), the text of the relevant statutory provision—Section 1433(b)(2) of the Tax Reform Act—does not specifically address the question whether the generation-skipping transfer tax applies to a transfer made pursuant to a general power of appointment after September 25, 1985, where the general power of appointment was conferred by a trust that had become

irrevocable before that date. Indeed, by its terms, Section 1433(b)(2) applies only to "[a] generation-skipping transfer under a trust which was irrevocable on September 25, 1985," whereas a transfer effected by a general power of appointment that was conferred by a trust can easily be viewed as a transfer *by the party exercising the power of appointment*, rather than a transfer under the trust itself. In this case, the generation-skipping transfer at issue occurred only because decedent exercised her power of appointment in favor of her grandchildren (and more remote descendants) after September 25, 1985; nothing in the initial trust instrument indicated that the creator of the trust even contemplated that a generation-skipping transfer would eventually occur. It is at best uncertain whether the text of Section 1433(b)(2) applies to such a transfer.

Under *Chevron*, the second step of the inquiry is "whether the agency's [interpretation] is based on a permissible construction of the statute." 467 U.S. at 843. In this case, the Treasury's interpretation was not only a permissible one, but the one more closely in accord with the purpose of the transitional rule: namely, "to protect those taxpayers who, on the basis of pre-existing rules, made arrangements from which they could not reasonably escape," not "to allow taxpayers who * * * seek to continue benefitting from a tax advantage that Congress has eliminated." *E. Norman Peterson Marital Trust* v. *Commissioner*, 78 F.3d 795, 801 (2d Cir. 1996). As the lower courts explained (Pet. App. 11a-12a, 39a-40a), the practical effect of a contrary interpretation of Section 1433(b)(2) would be to allow taxpayers to avoid paying GST tax on voluntary generation-skipping transfers, such as the transfer at issue here, that were

made well after the effective date of the provisions imposing that tax.

More broadly, the Treasury's interpretation was consistent with the treatment of general powers of appointment under other provisions of the Internal Revenue Code. It is a well-established principle of federal tax law that possession of a general power of appointment is tantamount to ownership of the property subject to the power. Thus, where an individual exercises (or releases) a general power of appointment, that exercise (or release) is treated as a gift of the underlying property by that individual for purposes of the federal gift tax. 26 U.S.C. 2514(b); see 5 Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates and Gifts* ¶ 121.6.1, at 121-39 to 121-40 (2d ed. 1993) (Bittker & Lokken). And where an individual holds a general power of appointment at the time of his death, the underlying property is treated as if it were owned by the individual, and is thereby included in the individual's estate, for purposes of the federal estate tax. 26 U.S.C. 2041(a)(2); see 5 Bittker & Lokken ¶ 128.1, at 128-3 to 128-4.

As the lower courts recognized (Pet. App. 11a, 38a-39a), it would be inconsistent with the treatment of general powers of appointment under those provisions to treat a transfer of property effected by a general power of appointment as if it were a transfer under the trust that conferred the power of appointment for purposes of the GST tax's transitional rule. See H.R. Rep. No. 426, 99th Cong., 1st Sess. 827 (1985) (explaining that the GST tax was "coordinat[ed]" with the gift and estate taxes); cf. *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 44 (1939) (stating that the gift and estate taxes "are *in pari materia* and must be construed together"). For pur-

poses of the gift and estate taxes, the conferral of a power of appointment (unless timely disclaimed) is itself in effect a transfer to the holder of the power, and the exercise of that power constitutes a *second* transfer—here, a transfer under decedent's will (the instrument under which the power was exercised), not under the trust that initially conferred the power. Pet. App. 10a.

2. Petitioner does not contend that the court of appeals' decision conflicts with the decision of any other court of appeals with respect to the specific question presented by this case—*i.e.*, whether 26 C.F.R. 26.2601-1(b)(1)(i) constitutes a valid exercise of the Treasury's rulemaking authority. Instead, petitioner contends only that the court of appeals' decision upholding the regulation violates the principle of *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), that "a judicial precedent holding that [a] statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Id.* at 982-983. The court of appeals considered and rejected that contention, see Pet. App. 9a n.2, and it was correct to do so.

In support of his argument, petitioner relies on two cases in which courts of appeals held, without regard to the Treasury's regulation, that Section 1433(b)(2)(A) applied to transfers effected by the exercise of general powers of appointment. See *Simpson* v. *United States*, 183 F.3d 812 (8th Cir. 1999); *Bachler* v. *United States*, 281 F.3d 1078 (9th Cir. 2002). In neither of those cases, however, did the court hold that the statute was "unambiguous" under the "demanding *Chevron* step one standard." *Brand X*, 545 U.S. at 982, 984. In *Simpson*, which predated (and precipitated) the Treasury's regu-

lation, the Eighth Circuit held that a transfer effected by the exercise of a general power of appointment was a "transfer under a trust" because "[t]he transfer was made possible by the trust." 183 F.3d at 814. While the court did state that "[t]he words of Section 1433(b)(2)(A) are clear, at least to us," and that there was not "substantial uncertainty as to the meaning" of the provision, the court also attached weight to the fact that "there [was no] regulation, temporary or permanent, that applies to the particular sort of transfer made here—a transfer of the entire corpus of the trust remaining at the time of the exercise of the power [of appointment]." *Id.* at 816. That fact would have been irrelevant if, as petitioner contends, the Eighth Circuit had believed that Congress directly spoke to the precise question at issue when it enacted Section 1433(b)(2)(A)—for, if it had, any regulation providing that Section 1433(b)(2)(A) did not apply to transfers effected by the exercise of general powers of appointment would fail step one of *Chevron*. As the court of appeals in this case recognized, nothing in *Simpson* thus suggests that the Eighth Circuit would have invalidated the Treasury's regulation if it had been in place at the time. See Pet. App. 9a n.2 (concluding that "*Simpson* never held that the statute was so clear that it foreclosed regulation").

Similarly, in *Bachler*, the Ninth Circuit held that a transfer effected by the exercise of a general power of appointment was a "transfer under a trust," on the ground that "[t]he transfer could not have been effected if it had not been under the trust." 281 F.3d at 1080. At the same time, however, the court noted that it was "not express[ing] any opinion on the validity of [26 C.F.R.] 26.2601-1(b)(1)(i)," which had been promulgated while proceedings in the case were ongoing and was not made

retroactively applicable to the time period at issue in that case. *Bachler*, 281 F.3d at 1080 n.1. There would have been no basis for the Ninth Circuit to reserve the question of the validity of the Treasury's regulation if it had believed that Congress had unambiguously addressed the question at issue in Section 1433(b)(2)(A) itself; indeed, the Ninth Circuit's opinion could be read as suggesting only that the text of Section 1433(b)(2)(A) was *silent* on that question. See *id.* at 1080 (stating that "[t]he statute * * * makes no exclusion for the exercise of a general power of appointment"). Like the Eighth Circuit's decision in *Simpson*, therefore, the Ninth Circuit's decision in *Bachler* did not trigger the *Brand X* rule.

At a minimum, it is questionable whether the Eighth or Ninth Circuit concluded that the language of Section 1433(b)(2)(A) was "unambiguous" under the "demanding *Chevron* step one standard," *Brand X*, 545 U.S. at 982, 984—and therefore whether the Eighth or Ninth Circuit would hold that the Treasury's regulation was invalid under *Chevron* analysis. If either circuit were to do so in a future case, the Court could address the resulting conflict concerning the validity of the Treasury's regulation at that time. The hypothetical possibility that either circuit would invalidate the regulation, however, provides an insufficient basis to grant review here.

More broadly, petitioner's reliance on *Brand X* rests on a fundamental misunderstanding of that decision. According to petitioner, once a single court of appeals (or, presumably, even a district court—or for that matter the Tax Court or a bankruptcy court) has concluded in a final, unreviewable decision that a statutory provision must be read in a certain way, the agency charged with administering that statute is subject to a binding

nationwide prohibition against promulgation of a regulation adopting a different interpretation, because any such "regulation is, in fact, trumped by a prior judicial construction holding that the agency's interpretation was 'unambiguously foreclose[d]' by the statute's plain language." Pet. 22 (quoting *Brand X*, 545 U.S. at 983). In effect, petitioner claims that *Brand X* overturned decades of agency "non-acquiescence" practice and compelled agencies to accept the first final lower-court "plain-language" interpretation of a statute (including, presumably, interpretations announced in cases to which the agency was not even a party).

Brand X held nothing of the kind. The question addressed in that case was not whether an agency would be bound *nationwide* by a prior lower-court decision interpreting the relevant statutory provision. Rather, the question was whether the obligation of courts to give *Chevron* deference to reasonable agency interpretations of ambiguous statutes was sufficient to trump an otherwise *binding precedent* of the *same court* when that court was presented with a challenge to an intervening agency interpretation that conflicted with the binding precedent of that same court. See *Brand X*, 545 U.S. at 982 ("The [Ninth Circuit] declined to apply *Chevron* because it thought the [FCC's] interpretation of the Communications Act foreclosed by the conflicting construction of the Act *it* [*i.e.*, the Ninth Circuit] had adopted in [its prior decision].") (emphasis added). In *Brand X*, the lower court had held that its earlier precedent "overrode the [FCC's] 'interpretation,' regardless of whether [the earlier decision] had held the statute to be unambiguous." *Ibid.* It was *that* rationale that the Supreme Court rejected in *Brand X*, holding instead that "judicial interpretations contained *in precedents*" are held to "the

same demanding *Chevron* step one standard." *Ibid.* (emphasis added). Thus, the rule announced in *Brand X* applies only when the initial judicial interpretation is otherwise binding "under the doctrine of *stare decisis*," and has no application where, as here, the allegedly inconsistent judicial interpretations have no binding force. *Id.* at 984.

3. Finally, the question presented in this case is of diminishing significance, because the regulation at issue involves the interpretation of a transitional rule that applies only to trusts that became irrevocable more than 20 years ago. In fact, the underlying transitional rule has generated only a handful of cases since it was enacted in 1986 as part of the Tax Reform Act. And we are aware of only one other currently pending case involving the specific question presented here—and the decision below will be binding in that case (which also arises in the Sixth Circuit). See *Timken* v. *United States*, No. 5:04-cv-01188-JRA (N.D. Ohio); see generally Br. of Estate of Louise Blyth Timken et al. Because the question presented is unlikely to recur frequently, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

NATHAN J. HOCHMAN
Assistant Attorney General

RICHARD FARBER
KAREN G. GREGORY
Attorneys

APRIL 2008

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No. 07-1064

In The
Supreme Court of the United States

ESTATE OF ELEANOR R. GERSON, DECEASED,
ALLAN D. KLEINMAN, EXECUTOR,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE* THE ESTATE OF LOUISE BLYTH TIMKEN, ET AL., IN SUPPORT OF PETITIONER

MATTHEW YACKSHAW
Counsel of Record
DAY KETTERER LTD.
MILLENNIUM CENTRE - SUITE 300
200 MARKET AVENUE NORTH
CANTON, OH 44701-4213
(330) 455-0173

Counsel for Amicus Curiae, The Estate of Louise Blyth Timken, et al.

March 20, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court, the Timken Family *Amicus Curiae*, who are specifically identified below respectfully move this Court for leave to file the accompanying brief *Amicus Curiae* in support of the Petition for Writ of Certiorari submitted by Petitioner, Estate of Eleanor R. Gerson, deceased, Allan D. Kleinman, Executor. The consent of the attorneys for Respondent was requested and obtained. The consent of the attorneys for Petitioner was requested but was not provided, which necessitates the filing of this motion.

The *amicus curiae* for this motion and brief are as follows:

1. Estate of Louise Blyth Timken;

2. Ward J. Timken and Joy A. Timken*, Co-Executors of the Estate of Louise Blyth Timken;

3. Henry H. Timken, Jr. Trust Fund A;

4. Henry H. Timken, Jr. Trust, Fund A1A fbo Alexander C. Timken;

---

* Joy A. Timken was substituted for W. R. Timken, Jr., who resigned as Co-Executor during the pendency of this case when he was appointed United States Ambassador to the Federal Republic of Germany by President George W. Bush.

5. Henry H. Timken, Jr. Trust, Fund A1B fbo Peter T. Toot;

6. Henry H. Timken, Jr. Trust, Fund A1C fbo Elizabeth Burnham Timken;

7. Henry H. Timken, Jr. Trust, Fund A2A fbo Susan M. Matthews;

8. Henry H. Timken, Jr. Trust, Fund A2B fbo Thomas Wesley Matthews;

9. Henry H. Timken, Jr. Trust, Fund A2C fbo Anna Virginie Corwin Timken;

10. Henry H. Timken, Jr. Trust, Fund A2D fbo Nicholas Timken;

11. Henry H. Timken, Jr. Trust, Fund A2E fbo John Henry Timken; and

12. Henry H. Timken, Jr. Trust, Fund A2F fbo Stuart Morgan Timken.

(Collectively referred to hereafter as "Timken Family *Amicus Curiae*").

The *Amicus Curiae* have a substantial interest in the outcome of the appeal of this case because they have a tax refund case pending in the United States District Court for the Northern District of Ohio, Case No. 5:04CV1188, in which the predecessor Treasury Regulation in issue in this case is sought to be invalidated. The *Amicus Curiae* seek a refund of $4,077,252.80 in generation skipping transfer tax

("GST tax") plus statutory interest. Like Petitioner here, the *Amicus Curiae* believe they qualify for exemption from the GST tax because of the grandfather provision of Section 1433(b)(2)(A) of the Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2731. Like the case here, Respondent claims that its Treasury Regulation promulgated in relation to the grandfather provision of the statute trumps that statute and precludes the exemption. The decision of this case may be determinative of the outcome of the tax refund case filed by the *Amicus Curiae*. *Amicus Curiae* were allowed to participate as *amicus curiae* in the Sixth Circuit. *Amicus Curiae* believe that it would be useful and helpful to the Court if they have an opportunity to submit their views on the grandfather provision and the related Treasury Regulation, §26.2601-1(b)(1)(i).

The Petition presents issues which have national implications concerning the applicability of the GST tax. The Petitioner, *Amicus Curiae*, and other taxpayers throughout the Country will be directly affected by the threshold determination as to whether the grandfather clause exempts them from the GST tax or not. The split in four Circuit Courts and in the U.S. Tax Court itself shows how controversial and important the issues really are which cry out for resolution by the Court once and for all. Where a federal tax law is interpreted and applied differently from Circuit to Circuit, an intolerable situation for all taxpayers and the Government is created: some taxpayers pay the substantial GST tax while others in the same position pay nothing. Where there are such disparate results affecting taxpayers throughout the land, the Court will be well served to have as many

responsible views on the issues as possible before it when it makes its decision about whether or not to take the case.

For the above reasons, the Timken Family *Amicus Curiae* respectfully request that their Motion for Leave to File the attached Brief of *Amicus Curiae* be granted.

Respectfully submitted,

Matthew Yackshaw
Counsel of Record
DAY KETTERER LTD.
Millennium Centre-Suite 300
200 Market Avenue North
Canton, Ohio 44701-4213
Telephone 330-455-0173

Counsel for the Timken Family
Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

The Timken Family *Amicus Curiae* are composed of a decedent's estate, the co-executors of that estate and various trusts who are all directly affected by this case. Like Petitioner here, the *Amicus Curiae* believe they qualify for exemption from the generation skipping transfer tax ("GST tax") because of the grandfather provision of §1433(b)(2)(A) of the Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2731. The *Amicus Curiae* seek a refund of $4,077,252.80 in GST tax plus statutory interest in a tax refund case pending in the United States District Court for the Northern District of Ohio, Case No. 5:04-CV-1188. In that case, the *Amicus Curiae* seek, *inter alia*, the invalidation of the predecessor Treasury Regulation in issue in this case.

SUMMARY OF ARGUMENT

The *Amicus Curiae* believe that the petition for writ of certiorari should be granted for the following reasons. First, the case presents a very important issue concerning the applicability of the generation skipping transfer tax ("GST tax"), which is a tax that has not been previously addressed by the Court. Second, there has been a failure by the Sixth Circuit below to follow the appropriate decisional rules for statutory interpretation established by this Court,

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel for *Amicus Curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or the submission of this brief.

which failure warrants the attention of this Court. Third, the Sixth Circuit's decision below exacerbates a conflict which exists in the Circuits on the grandfather provision of the GST tax. A taxpayer is exempt from the GST tax in the Eighth and Ninth Circuits, but loses in the Second and Sixth Circuits. This creates disparate treatment for similarly situated taxpayers where there should and must be uniformity. Fourth, the Treasury Department cannot be allowed to overrule Congressional legislation by regulatory fiat; the regulation in issue usurps the role of Congress in determining what to tax. Finally, this case presents a good opportunity for the Court to aid the analytic process set out in *Chevron* to provide specific guidance to courts and practitioners in determining what language and words are or are not ambiguous so that the Tax Court, District Courts and Circuit Courts can consistently apply the tests and come to similar results. Any one of these arguments by itself is sufficient grounds for granting the petition, and together create an overwhelming and compelling case for granting the petition and accepting the case for a hearing on the merits.

ARGUMENT

I. The Case Presents a Very Important Issue for the Administration of the Generation Skipping Transfer Tax.

The Sixth Circuit upheld a Treasury Regulation that was promulgated in relation to an uncodified grandfather clause enacted as part of the Tax Reform Act of 1986, Pub. L. No. 99-514, §1433(b)(2)(A), 100 Stats. 2717, 2731. That law, among other things,

provided for the imposition of a generation skipping transfer tax ("GST tax"), but also included an effective date provision or grandfather clause that provided that any generation skipping transfer under a trust which was irrevocable on September 25, 1985, would not be subject to the tax, but only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985. Thus, Congress provided a broad and simple grandfather provision that carves out from the reach of the GST tax various and numerous generation skipping transfers that would otherwise be subject to the tax. Congress specifically provided that only two statutory requirements had to be met in order to qualify for exclusion from the GST tax under the grandfather provision. One is that the transfer be made under a trust which was irrevocable on September 25, 1985. The second is that the transfer in question not be made out of corpus added to the trust after September 25, 1985.

In the face of such simplicity, the Treasury Department promulgated a series of ever-complex and sweeping regulations that had the net effect of completely overriding the Congressional purpose in providing the broadly-worded grandfather provision for all trusts containing a general power of appointment.

The Treasury Department took the simple grandfather provision and added one caveat and condition after another through a series of regulations until nothing can fall outside of the GST taxing scheme, including the transfers which occurred in this case and in other cases. This interpretation and

approach embodied in the regulation finds no support in the statutory text.

Any Treasury Regulation must fail or be held invalid if it takes away a benefit explicitly conferred by Congress and/or imposes a restriction to a taxing statute which is not contained in the statute. *United States v. Calamaro*, 354 U.S. 351, 354, 77 S. Ct. 1138, 1 L. Ed.2d 1394 (1957) ("*Calamaro*") ("[W]e cannot but regard this Treasury Regulation as no more than an attempted addition to the statute of something which is not there"). The Treasury cannot impose a tax by regulation, which is exactly what is being intended by the regulation in issue. See also *Commissioner v. Acker*, 361 U.S. 87, 80 S. Ct. 144, 4 L. Ed.2d 127 (1959); *Koshland v. Helvering*, 298 U.S. 441, 443 (1936). As succinctly stated in *National Life and Accident Ins. Co. v. United States*, 524 F.2d 559, 560 (6th Cir. 1975):

> An income tax regulation cannot take away a benefit conferred by the Internal Revenue Code. ...Nor may the Commissioner add a restriction to the statute which is not contained in the statute...
>
> The Courts and the Commissioner do not have the power to repeal or amend the enactments of the legislature even though they may disagree with the result; rather it is their function to give the natural and plain meaning effect to statutes as passed by Congress. (citations omitted.)

A treasury regulation should not be sustained if it is unreasonable and plainly inconsistent with the

revenue statute. *United States v. Cartwright*, 411 U.S. 546, 93 S. Ct. 1713, 36 L. Ed.2d 528 (1973) (invalidating Treasury Regulation on valuation of mutual fund shares). See also *Commissioner v. Acker*, *infra* at p.4, where the Court affirmed the invalidation of an estimated tax penalty regulation because it was unreasonable and plainly inconsistent with the statute.

II. This Case Presents a Situation of a Failure by the Sixth Circuit to Follow the Appropriate Decisional Rules for Statutory Interpretation and Administrative Regulations.

The Court says the plain language of a tax statute controls. In *Gitlitz v. Commissioner*, 531 U.S. 206, 212 S. Ct. 701, 148 L. Ed.2d 613 (2001), the Court rejected the IRS policy concern about an alleged double windfall that apparently was going to be realized by the taxpayers because "the code's plain text permits the taxpayers here to receive these benefits." This is in keeping with a fundamental rule of statutory construction, which is that "where...the statute's language is plain, the sole function of the courts is to enforce it according to its terms." See *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 239, 109 S. Ct. 1026, 103 L. Ed.2d 290 (1989) ("*Ron Pair*") ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."); *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 295, 115 S. Ct. 2144, 132 L. Ed.2d 226 (1985) ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most

extraordinary circumstance, is finished"); *Yates v. Hendon*, 541 U.S. 1, 124 S. Ct. 1330, 158 L. Ed.2d 40 (2004) ("because the statute's text is adequately informative, we need not look outside ERISA itself"). Over and over in *Gitlitz*, the Court resorted to "the plain language of the statute" to determine the complex issues presented related to Internal Revenue Code Sections 108 and 1366 and rejected the IRS positions including its reliance upon a Treasury Regulation.

In this regard, the present case is strikingly similar to *Iselin v. United States*, 270 U.S. 245, 46 S. Ct. 248, 70 L. Ed. 566 (1926) ("*Iselin*"), which is another case in which the IRS attempted to change the scope of a plainly worded tax statute by reading in language that Congress, according to the IRS, had inadvertently omitted. In *Iselin*, as in the present case, the plain language of the tax statute appeared to exempt from taxation a particular transaction (sales of certain theater tickets). As in the present case, the IRS argued that despite the plain language of the statute, "Congress clearly intended to tax all sales of tickets" and that this general purpose of Congress should be given effect so as to reach all cases within the general scope of the legislation. The Court summarily rejected the IRS's attempt to change the plain meaning of the statute and held that the ticket sales were exempted from the tax. The Court stated, *supra* at 251:

> [The statute's] language is plain and unambiguous. What the Government asks is not a construction of the statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may

> be included within its scope. To supply omissions transcends the judicial function.[2]

In the present case, the Respondent invites this Court to do what the Court in *Iselin* rejected - to validate a Treasury Department change to the plain meaning of §1433(b)(2)(A) by reading additional language and requirements into the statute. As stated in *Iselin*, this kind of act "transcends the judicial function" and is, therefore, erroneous and impermissible. See also *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 102 S. Ct. 821, 70 L. Ed.2d 792 (1982) ("*Vogel*") (invalidating tax regulation); and *Calamaro*, *infra* at p.4, which disregarded a Treasury Regulation which represented an attempted addition to the wagering tax statute.

Applying the above principles, the Treasury Regulation in issue here should be invalidated. First, Congress has directly spoken to the precise question in this case with clear language and intent. In §1433(b)(2)(A), Congress specifically stated that irrevocable trusts are exempt from the reach of the GST tax provided the trust was irrevocable prior to September 25, 1985, and nothing was added to the corpus of the trust thereafter. The teaching of the above cases is that we should start from the basic premise that Congress meant what it wrote into law. There was no suggestion that the existence of a

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[2] This very passage and fundamental analysis was cited approvingly by the Court in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 92, 111 S. Ct. 1138, 113 L. Ed.2d 68 (1991).

general power of appointment within the trust would or should make a difference, or that the release, exercise or lapse of a general power would or should make a difference on whether the trust is exempt from the GST tax. The grandfather clause was broadly drawn and carries none of the baggage or restrictions that the IRS would like to engraft upon the law in the Treasury Regulation at issue here ("the Regulation"). Because the broad intent of Congress is clear and unambiguous, there is no basis to validate the Regulation. In accord, *Simpson v. United States*, 183 F.3d 812, 813 (8th Cir. 1999) (finding the language of the grandfather provision to be plain); and *Bachler v. United States*, 281 F.3d 1078 (9th Cir. 2002) (also finding the grandfather provision to be clear and straightforward).

Second, the Regulation is not a reasonable interpretation of §1433(b)(2)(A). In determining whether an interpretive regulation implements the congressional mandate in some reasonable manner, this Court should look to see whether the regulation is harmonious with the plain language of the statute, its origin, and its purpose. *Rowan Cos. v. United States*, 452 U.S. 247, 253, 101 S. Ct. 2288, 68 L. Ed.2d 814 (1981) ("*Rowan*").

In undertaking this kind of analysis, the statutory language is paramount. It is clear that Congress intended to generally except from the reach of the then new GST tax any and all pre-existing irrevocable

trusts.[3] The reason for this is plain: because the original grantors (living or dead) could do nothing to change the provisions of the irrevocable trust to avoid the otherwise unfair impact of the GST tax. The essence of an irrevocable trust is that no modifications of existing trust provisions can be made to take account of future events, including the passage of a tax act. In order to eliminate the otherwise unfair impact of the GST tax upon those irrevocable trusts, Congress provided the general exception of the effective date rule. The only exception made to the general exception of a trust that was irrevocable before September 25, 1985, is only to the extent that transfers are attributable to additions to the trust corpus occurring after that date. Of course, this was intended to prevent stuffing an irrevocable trust with additional assets once it was realized that it could otherwise be used as a Congressionally sanctioned method to pass assets to skip persons without being subject to the GST tax. That sensible and fair result, which is consistent with the plain meaning of the words, is the only allowable restriction that could be read into the grandfather clause.

The Regulation here removes from the protection of the effective date rule any trust subject to or including a general power of appointment, even though the trust was irrevocable on September 25, 1985, and no addition to corpus had been made to it after that date.

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[3] Direct skips like those involved here were not covered by the 1976 Tax Reform Act version of the GST tax and were not made subject to that tax for the first time until the Tax Reform Act of 1986.

In taking this position, the IRS has added major restrictions to the grandfather clause which Congress did not impose. This added restriction is an unreasonable statutory interpretation which does not harmonize with the plain language of the statute, its origin, and its purpose. Accordingly, the Regulation is invalid, and the grandfather clause excepts the Estate here from the GST tax.

The words of the statute are plain words, which should be given their normal meaning. The Court stated in *Burlington N.R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461, 107 S. Ct. 1855, 95 L. Ed.2d 404 (1987):

> ...the language of the statute itself must ordinarily be regarded as conclusive. ...Unless exceptional circumstances dictate otherwise, when we find the terms of a statute unambiguous, judicial inquiry is complete.

Here, as in *Burlington*, the statutory language is unambiguous. There is nothing that suggests that trusts containing a general power of appointment should not be exempt under the grandfather provision. Driving even deeper into the Regulation, there is nothing to support the constructive addition concept. Webster's New International Dictionary of the English Language (3rd Ed. 1963) defines the term "add" as to "join or unite so as to increase the number, augment the quantity." Under no common understanding of the word can added be given the construction provided by the Regulation. In accord, *S. D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, fn5, 126 S. Ct. 1843, 164 L. Ed.2d. 625 (2006) ("If one takes

a ladle of soup from a pot ... and pours it back into the pot, one has not 'added' soup or anything else to the pot.") Congress actually uses the word "constructive" when it is intended to apply. See, eg., 26 U.S.C. §§267, 318, 544, 1260, 2056, 2652, 3123, and 4216. Congress ought to be able to reasonably expect that normal language usage applies without having to explain or define every word in a statute.

The IRS has no discretion to impose a tax or increase a taxpayer's tax liability. The IRS is constrained by the laws passed by Congress, who determines who and what is taxed and who and what is exempt. Congress, not the IRS, made a policy decision when it enacted the 1986 Tax Reform Act to not impose the GST tax on irrevocable trusts already in existence. The IRS obviously does not like that decision. But it was Congress' decision to make. It should not matter that the IRS really wants to hammer the trust assets and beneficiaries with a GST tax *in addition* to the confiscatory-like federal estate tax to which they were already subject by IRC §2041. The Regulation is nothing more than an attempt to amend the tax code to achieve a harsh result, where Congress specifically expressed its intent to avoid harsh consequences like this one in plain language.

Unable to tax under the plain language of the statute, the Treasury attempts to circumvent this statute by promulgating and then citing to its own make-weight regulations reinterpreting and drastically changing the meaning of the congressionally-created grandfather clause. Under the regulations, the existence and exercise (or lapse) of a power of appointment never mentioned in the

grandfather clause, not the date the trust became irrevocable, becomes critical to application of the GST tax. The Treasury strategy of continually changing the Regulation reveals its own lack of confidence in its reading of the plain statutory language. Moreover, it is just plain unfair and unlawful for an agency like the Treasury to promulgate and invoke a regulation that bears no resemblance to the statutory language to win litigation. In its eagerness to tax, the Treasury supplants the role of both Congress and the courts.

The Regulation makes the effective date statute a nullity for all general power of appointment marital deduction trusts, which were the most common tools for garden-variety marital estate planning prior to 1983 and which remain commonly used devices for many reasons, including tax reasons. Richard Nenno, Esq., *Gerson v. Com.: Donees of General Powers of Appointment Over Grandfather Trusts Unite* in 32 TAX MGMT. EST., GIFT TR. J., 131, 134 (2007) ("Nenno article") ("After all, until 1982, virtually all marital deduction trusts were established under §2056(b)(5), which *requires* the surviving spouse to have such a power.") (Emphasis added.) None could qualify for relief under the effective date statute if a general power of appointment exists with respect to the assets. Courts cannot allow a construction of a statute by regulation or otherwise that, in effect, renders it a nullity. *United States v. Larionoff*, 431 U.S. 864, 872, 97 S. Ct. 2150, 53 L. Ed.2d. 48 (1977). See also *Knight v. Commissioner*, 552 U.S. ____, 128 S. Ct. 782 (2008) ("...accepting the...approach would render part of the statute entirely superfluous, something we are loath to do.") It is simply impermissible to make and promulgate such a regulation. It is perfectly clear that

Congress could have withheld the exception from those existing trusts, but it did not, and it did not grant the Treasury Department any discretion to concoct and add a strained and strange meaning to the phrase "generation-skipping transfer under a trust" and the word "added" (or the phrase "corpus added to the trust") in order to reach the result Treasury wants.

Congress has been especially precise, meticulous and very explicit regarding the estate and gift tax consequences of the lapse, release, and exercise of general powers of appointment ever since the estate and gift tax laws were first enacted. Had Congress actually intended that those events cause ineligibility for the irrevocable trust effective date exception, its consistent practice would have caused it to create specific language with the provision. The absence of such language in the irrevocable trust exception, or even a hint of it, is very strong evidence that Congress had no such intent or expectation. For example, Congress could have added the following language to §1433(b)(2)(A): "provided, however, this exception shall not apply to any generation-skipping transfer resulting from a release, exercise, or lapse of a general power of appointment after September 25, 1985." Congress did not add such language to the statute. Cf. examples of such an approach in *Ron Pair*, *infra* at p.6, fns. 4 & 5. Thus, the Treasury had no power or authority to introduce that concept into regulations pertaining to the effective date statute so as to render it a nullity.

III. The Conflict in the Circuits on the Issue Here Creates an Intolerable Situation That Can Only be Corrected by The Court.

A conflict presently exists in the Circuits on the issue raised in this case. If a taxpayer is fortunate enough to be in the Eighth or Ninth Circuits, they will win. But if the taxpayer is unfortunate enough to be in the Second or Sixth Circuits, they will probably lose. Compare *Simpson v. United States*, 183 F.3d 812 (8th Cir. 1999), and *Bachler v. United States*, 281 F.3d 1078 (9th Cir. 2002). with *Estate of Eleanor R. Gerson v. Commissioner*, 507 F. 3d 435 (6th Cir. 2007), and *E. Norman Peterson Marital Trust v. Commissioner*, 78 F.3d 795 (2nd Cir. 1996). No one knows how the other Circuits would rule on the issue. The Sixth Circuit in its opinion below explicitly recognizes the fact that this conflict exists:

> The parties' dispute on this second clause brings to this court a question that divides three of our sister circuits and the Tax Court below. (Citations omitted.) *Gerson*, *supra* at 438.

A dichotomy presently exists where there should and must be uniformity in taxation. Furthermore, the deep division within the United States Tax Court as evidenced by the multiple dissenting and concurrent opinions on the precise issue presented by this case, found at 127 T.C. 139, is a further indication of the seriousness of the conflict and that the issue presented here can be considered a close, interesting, and challenging question worthy of the Court's review under Rule 10(a) of the Supreme Court Rules. The issues raised by this case have also drawn some

scholarly attention. See, eg., Nenno article, *infra* at p. 13.

IV. The Treasury Department and The IRS Cannot be Permitted to Override Congressional Legislation by Regulatory Fiat.

The Congress provided a plain and simple exception to the application of the GST tax in the grandfather provision. By promulgating a regulation which totally overrides the grandfather provision, the Treasury has usurped the role of Congress in determining what to tax. Clearly, the Court must reject the Treasury's attempt to overrule the Congressional legislation and see that it is given its proper force and effect as intended by Congress in the clear and plain language that it used in enacting the grandfather clause.

V. Treasury Regulation §26.2601-1(b)(1)(v) is not a Valid Regulation.

In determining the validity of a regulation, it is important to determine whether the regulation is a legislative regulation, which flows from a specific congressional grant of authority, or an interpretive regulation which does not. A legislative regulation can only be set aside by a Court if it is arbitrary, capricious, or manifestly contrary to the statute. In contrast, an interpretive regulation is upheld only if it harmonizes with the plain language of the statute, its origin, and its purpose. *Rowan, infra* at p.9.

There is no dispute that the regulation relied upon by Respondent here is an interpretive regulation. *Peterson*, *supra* 78 F.3d at 798. The authority for the regulation is derived solely from the interpretive authority under Internal Revenue Code §7805(a), which is "more circumscribed." *Vogel*, *infra* at p.8.

Chevron U.S.A., Inc. v. National Resource Defense Counsel, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed.2d 694 (1984) ("*Chevron*"), is generally considered as setting forth the extent to which a court should accord deference to an agency interpretation of a statutory term, including an interpretative regulation promulgated under the Internal Revenue Code §7805(a). *Chevron* held that:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court has determined that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as it would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Supra* at 842-3.

When a court is faced with an interpretive regulation promulgated under Code §7805(a), the interpretation is entitled to less deference than a legislative regulation. *Rowan, infra* at p.9; *Vogel, infra* at p.8.

The answers to both *Chevron* questions favor petitioner here.

First, Congress has directly spoken to the precise question in this case with clear language and intent. Congress intended all irrevocable trusts to be exempt from the reach of the GST tax provided that the trust was irrevocable prior to September 25, 1985, and nothing was added to the corpus of the trust thereafter. There was no suggestion that the existence of a general power of appointment would make a difference, or that the release, exercise, or lapse of a general power would make a difference. There is no mention in words or by implication of any legal fiction about whether an irrevocable trust could contain a general power or not. Either way, such a trust would qualify for the grandfather clause because no such qualification is contained within the grandfather clause. The grandfather clause was broadly drawn and carries none of the baggage the IRS would like to engraft upon the law. Because the broad language used by Congress is clear and unambiguous, there is no basis to validate the regulation under *Chevron*.

Second, the Regulation is not a reasonable construction of the grandfather clause. In determining whether an interpretive regulation implements the Congressional mandate in some reasonable manner, the Court should look to see whether the Regulation is harmonious with the plain language of the statute, its

origin, and purpose. In undertaking this kind of analysis the statutory language is paramount. It is clear that Congress intended to generally exempt from the reach of the then new GST tax all pre-existing irrevocable trusts. The reason is plain: because the grantors could do nothing to change or avoid the impact of the GST tax because their trusts were irrevocable. By definition, the essence of an irrevocable trust is that no changes could be made to take account of future events such as the passage of a tax act. In order to limit the harsh impact of the GST tax upon such trusts Congress provided the general exception of the grandfather clause.

Respondent in its regulation would remove from the protection of the grandfather clause any trust subject to a general power of appointment, even if the trust was irrevocable on September 25, 1985, and no addition has been made to corpus after that date. Taking this position, Respondent has added major restrictions to the grandfather clause which Congress did not impose. These added restrictions are an unreasonable statutory interpretation which do not harmonize with the plain language of the statute, its origin, and its purpose. Regulations can carry out the purposes of an act, not amend it. *Miller v. United States*, 294 U.S. 435, 438, 55 S. Ct. 440, 79 L. Ed.2d 977 (1935). Accordingly, the Regulation is invalid, and the grandfather clause excepts the transfers at issue here from the GST tax.

The fact that Mr. Gerson gave Mrs. Gerson a general power of appointment makes no difference. He obviously gave her the power in order to qualify his trust for the estate tax marital deduction which then

was very conventional estate planning. See Nenno article, p. 134. Congress did not write the broad grandfather clause unmindful of the norm for trusts.

VI. The Lower Courts Need the Court's Guidance to Determine When A Statute Is Ambiguous.

This case presents a perfect illustration of how the lower courts are in need of guidance to determine when a statute is ambiguous permitting administrative interpretation by regulation. On the one hand, the Eighth and Ninth Circuits say the grandfather clause is plain and unambiguous and the Second and Sixth Circuits say the opposite. The same basic conflict is displayed in the 6 opinions authored by the Tax Court judges in this very case.

CONCLUSION

For all the foregoing reasons, the Timken family *Amicus Curiae* respectly request that the Court grant the petition for writ of certiorari.

Respectfully Submitted,

Matthew Yackshaw
DAY KETTERER LTD.
200 Market Avenue North
Canton, Ohio 44701-4213
Telephone 330-455-0173